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ABSTRACT

The obligations of colleges and universities under existing laws prohibiting sex discrimination are discussed. Attention is directed to developments in the law relating to sex discrimination against employees and against students in colleges and universities, and practical and cost-efficient strategies for complying with the law. The pertinent laws on sex discrimination against employees, job applicants, and students are cited. The employee-related laws address hiring, retention, promotion, tenure, salary and fringe benefits, sexual harassment, and affirmative action practices for government contracts. Judicial decisions are based on the prima facie case, rebuttal, pretext, and the discovery of confidential faculty evaluations. The laws on sex discrimination against students address practices in admissions, tuition rates, financial aid, sexual harassment, student organizations, student services, housing and parietal rules, and athletics. Three strategies for compliance are: (1) carefully selecting and training key academic and administrative personnel, including faculty who serve on review and search committees; (2) implementing a management control system; and (3) securing indemnification against losses suffered as a result of unintentional discrimination. (SW)

SEX DISCRIMINATION LAW IN HIGHER EDUCATION:

The Lessons of The Past Decade

J. Ralph Lindgren
Patti T. Ota
Perry A. Zirkel
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Report 4

Sex Discrimination Law in Higher Education:
The Lessons of the Past Decade

by J. Ralph Lindgren, Patti T. Ota, Perry A. Zirkel, and Nan Van Gieson

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EXECUTIVE SUMMARY

During the decade since legal measures barring discrimination on the basis of sex were first made applicable to colleges and universities, it has become increasingly evident that failure to comply with these requirements can be expensive and disruptive. It is not uncommon for the press to carry notices of settlements, in and out of court, that run to hundreds of thousands of dollars. Some universities have been required to operate under court-supervised corrective programs for up to eight years.

The more clearly colleges and universities understand their obligations under existing antidiscrimination laws, the better they will be able to reduce the risk of incurring such costs. Valuable lessons can be learned from the experience of others caught in these legal difficulties.

The purpose of this report is to clarify, to the extent that emerging law allows, the obligations of colleges and universities under existing laws prohibiting sex discrimination. Two parts of the report discuss developments in the law relating to sex discrimination against employees and against students in colleges and universities. The final part identifies three practical and cost-efficient strategies for complying with the law.

What Are the Sources of Obligation Prohibiting Sex Discrimination against Employees?

At present, the principal federal sources of legal obligation for colleges and universities to avoid sex discrimination against employees are the equal protection clause of the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and Executive Order No. 11246.

Title VII has undergone significant developments during the last decade. The Equal Employment Opportunity Commission (EEOC) called attention to and then published guidelines concerning sexual harassment. Congress passed the Pregnancy Discrimination Act. The Supreme Court interpreted Title VII as forbidding employers' sponsorship of insurance and retirement programs based on sex-based actuarial tables. Lower courts supported the right of academic plaintiffs, under carefully defined circumstances, to have access to the content of confidential peer review files and even votes and began to lend credence to statistical evidence in discrimination cases. Finally, throughout the

decade courts uniformly and consistently approved the permissibility of affirmative action programs developed under the executive order against both equal protection and Title VII challenges.

During the decade, plaintiffs continued to be generally unsuccessful in suits brought under the Equal Pay Act, apparently because plaintiffs found it difficult to show, as is required by the act, that their jobs were equal in "skill, effort, and responsibility" to ones performed by better-paid males in similar working conditions.

What Are the Sources of Obligation Prohibiting Sex Discrimination against Students?

The principal federal sources of legal obligation to avoid sex discrimination against students are the equal protection clause and Title IX of the Education Amendments of 1972. Equal rights amendments to state constitutions and state civil rights statutes have also been used to successfully challenge discriminatory practices in colleges and universities during the past decade.

Generally speaking, under Title IX all educational institutions receiving federal funds are under obligation to avoid the use of sex as a classifying tool or criterion for decisions or to use other bases of classification that disproportionately disadvantage one sex or the other. During the decade since its adoption, the Supreme Court decided three strategically important questions about Title IX. In 1982, it held that sex discrimination in college and university employment is covered by Title IX. In 1984, the Court ruled that the receipt of federal funds by students is sufficient to make an institution liable under Title IX and that compliance with Title IX applies only to those programs that directly benefit from federal financial assistance. A recent decision by one circuit court is of potentially strategic importance. In 1981, the Seventh Circuit Court of Appeals held that Title IX prohibits only intentional sex discrimination.

Court decisions during the past decade have affected specific areas of student concern. With the exception of private undergraduate colleges, single-sex admissions policies have been virtually prohibited. Tuition rates and financial aid that work to the disadvantage of one sex have been barred. Sex-restricted student organizations, such as all-

male honor societies, were banned. Separate-but-equal standards were applied to cases involving male and female housing, parietal rules, and athletic teams. During the decade, federal guidelines were issued on the prevention of sexual harassment of students.

What Strategies Are Suggested for Compliance?

This report proposes three strategic measures designed to minimize the risk of liability resulting from sex discrimination, institutional disruption, and expense. The first is to carefully select and train key academic and administrative personnel, including faculty who serve on review and search committees. These people should be trained through briefings and workshops to understand the institution's obligations under antidiscrimination laws. Personnel who resist the full integration of women into the life of the campus require special attention, because they place the institution at serious legal risk.

The second measure proposed is a standard business technique for implementing change called a "management control system." Its five steps including designing and disseminating a policy of sexual equity, assigning responsibility for the implementation of that policy, training line personnel in their new responsibilities under that policy, monitoring the nature and extent of residual sexual bias, and designing and implementing remedial programs to ensure compliance with the policy on a definite timetable.

Although diligently selecting and training pesonnel and conscientiously implementing a management control system do minimize the risk of liability under antidiscrimination laws, that risk can never be completely eliminated. The third recommendation this report proposes is to complement these steps with indemnification of losses suffered as a result of intentional discrimination. Combined, these steps should minimize the incidence of sex discrimination and the risk of loss resulting from it.

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FOREWORD

The issues surrounding sex discrimination in higher education are filled with contradictions and conflict. Solutions have been sought through numerous government regulations, and there has been a general effort to raise levels of consciousness and sensitivity within the institutions themselves. It would seem that efforts of the last decade would by now have eliminated sex discrimination in academe. Not so, for either faculty or students.

Examination of faculty academic rank by sex suggests evidence of discrimination. At the instructor level, women make up more than fifty percent of the faculty, yet at full professor level they make up less than ten percent. With fewer faculty now being hired and increased competition for available openings, administrators must still view the potential for sex discrimination carefully. At the student level, tuition rates, financial aid, housing, and athletics are all subject to discriminatory practices.

In this report by J. Ralph Lindgren, Patti T. Ota, Perry A. Zirkel, and Nan Van Gieson, all of Lehigh University, the full spectrum of sex discrimination law covering both employees and students is fully reviewed. The authors have carefully examined federal and state regulations concerning sex discrimination and their effects. Their concluding chapter lists three specific recommendations to help institutions guard against being found guilty of discrimination. This report will be valuable reading not only for presidents and staff responsible for monitoring equality issues. It will be useful also for administrators and faculty whose daily decision making can become careless and result in embarassing litigation.

Jonathan D. Fife
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Professor and Director
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INTRODUCTION

At this point in our society's history, people generally agree that sex discrimination has no place in higher education. Educators now agree that the time has come to eliminate those practices that in the past resulted in the denial of equal educational and employment opportunities to people because of their sex.

In no small measure, this consensus was prompted by action taken in the early 1970s by the federal government. During the decade since then, all three branches of government have been active in developing and implementing a legal framework of prohibitions and requirements aimed at making this consensual goal a reality.

The principal sources of legal obligation to avoid sex discrimination against employees and applicants for employment that apply to colleges and universities are Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and Executive Order No. 11246. Obligations under these statutes and orders were first made applicable to higher education in 1972. In that year, Title VII was amended to remove an exemption in the original act that excluded educational institutions, the Equal Pay Act was amended to remove an exemption for academic personnel, and the federal government asserted the applicability of the executive order to colleges and univerities. After a brief period during which some courts appeared to grant special deference to college and universities, it has become reasonably clear that the legal obligations of higher education to avoid sex discrimination in employment are approximately the same as those of any other employer.

The principal source of legal obligation to avoid sex discrimination against students arises under Title IX of the Education Amendments of 1972. Generally speaking, under Title IX all educational institutions receiving federal funds are under obligation to avoid the use of sex as a classifying tool or criterion for decisions or to use other bases of classification that disproportionately disadvantage one sex or the other. Recent Supreme Court decisions have clarified some of these obligations and the conditions under which they apply.

In the decade since legal measures barring sex discrimination were first made applicable to college and universities, one point has become quite clear: Failure to comply with these requirements can be expensive and disruptive.

The most widely publicized settlement involved the University of Minnesota, which will be operating under a court-supervised affirmative action program for eight years and may incur as much as $60 million in costs. The academic press has regularly reported other such cases.

The more clearly colleges and universities understand their obligations under existing antidiscrimination laws, the better will be their position to reduce the risk of incurring such costs. Valuable lessons can be learned from the experiences of others caught in these legal difficulties.

The purpose of this report is to clarify the obligations of colleges and universities under existing antidiscrimination laws. The next two parts review legal obligations to employees and to students as they have been clarified through court decisions during the past decade. The report concludes by proposing three strategic measures designed to minimize the risk of liability resulting from sex discrimination without significantly increasing personnel, institutional disruption, or expense.

THE LAW ON SEX DISCRIMINATION AGAINST EMPLOYEES

Sources of Obligation

Employers' obligations to avoid sex discrimination against employees and applicants for employment are imposed by the Fourteenth Amendment to the U.S. Constitution (the equal protection clause), by federal statutes (Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Equal Pay Act of 1963), and by Executive Order No. 11246. In some states, state statutes impose similar obligations. Most of these obligations became applicable to colleges and universities in 1972. In that year, Title VII was amended to remove an exemption in the original act that excluded educational institutions, the Equal Pay Act was amended to remove an exemption for academic personnel, and the federal government asserted the applicability of the executive order to colleges and universities. Since then, it is reasonably clear that the obligations of colleges and universities to avoid discriminating against employees and applicants for employment because of their sex are approximately the same as those of any other employer.

Most . . . obligations [to avoid sex discrimination against employees] became applicable to colleges and universities in 1972.

The equal protection clause

The Fourteenth Amendment to the U. S. Constitution provides in part that ". . . [N]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." For almost a century after its ratification in 1868, this clause was interpreted as a barrier only to racial classifications on the part of governments. More recently, the clause has been interpreted to secure the rights of citizens against other forms of discriminatory classification as well. Since 1971 [in *Reed* v. *Reed*, 404 U.S. 71 (1971)], the equal protection clause has been interpreted as a bar to the classification of individuals by sex unless justified under "heightened scrutiny." Laws and government practices that rely upon sex-based classifications must now be substantially related to the advancement of an important government interest [*Craig* v. *Boren*, 429 U.S. 190 (1976)].

A number of employment practices have been declared in violation of the Fourteenth Amendment. In *Frontiero* v. *Richardson* [411 U.S. 677 (1973)], for example, the Supreme Court struck down a federal statute that required female, but not male, Air Force officers to demonstrate dependency of their spouses to qualify for selected bene-

fits. In *Cleveland Board of Education* v. *LaFleur* [414 U.S. 632 (1973)], the Court rejected a school board's mandatory maternity leave policy because it conclusively presumed that pregnant teachers are unfit to perform their classroom duties.

None of these employment decisions involved colleges or universities, however, and three reasons seem apparent for this absence. First, many colleges and universities are not covered by the equal protection clause, because the clause applies only where "state action" is involved. Although exact interpretation of this restriction is highly technical, in general it is clear that the clause does reach all public institutions of higher education but does not reach most private universities and colleges. Second, a number of statutes that prohibit sex discrimination in employment and that apply to all colleges and universities have been in force since the early 1970s. Potential plaintiffs are more likely to prevail when they bring action under these statutes than under the equal protection clause. To prevail on grounds of equal protection, a plaintiff must show not only discriminatory impact but also discriminatory intent [*Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256 (1979)]. Third, a plaintiff has more incentive to sue under the statutes. The relief granted to parties who prevail on grounds of equal protection seldom includes a monetary award.

Title VII

Generally speaking, Title VII of the Civil Rights Act of 1964 [42 U.S.C. §2000e (1976)] prohibits employment practices that discriminate against individuals on the basis of race, color, religion, sex, or national origin. As originally enacted, the statute barred discrimination in employment on the basis of sex but provided an exemption for "an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution." In 1972, the 92nd Congress removed that exemption.

Some colleges and universities have attempted to avoid liability under Title VII on the basis of their special status in relation to a state or to a church. These efforts have so far proved unsuccessful. In *Shawer* v. *Indiana University of Pennsylvania* [602 F.2d 1161 (3d Cir. 1979)], the Third

Circuit Court of Appeals declared that a state university cannot claim an exemption from liability under Title VII by invoking the doctrine of sovereign immunity. The Fifth Circuit declared, in *EEOC* v. *Mississippi College* [626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981)], that the separation of church and state as guaranteed by the First Amendment does not protect a church-related college from liability under Title VII for unlawful employment practices relating to a faculty member.

Three provisions of Title VII are especially important to colleges and universities. It is unlawful for an employer:

> *(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .; or*
>
> *(2) to limit, segregate, or classify his employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . .; or*
>
> *(3) to discriminate against any individual . . . because he has opposed any practice made an unlawful practice by this sub-chapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this sub-chapter* (42 U.S.C. §2000e).

Title VII includes an exception to the general prohibition of sex discrimination in employment if the sex of the individual ". . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business . . ." [42 U.S.C. §2000e-2 (e)(1)]. The courts have interpreted the exception very narrowly [*Dothard* v. *Rawlinson*, 433 U.S. 321 (1977)]. This exception does not appear to be applicable to any employment situation ordinarily present in colleges and universities.

Title IX

The requirements of Title IX of the Education Amendments of 1972 [20 U.S.C. §1681 (1976)] are discussed ex-

tensively in the following section of this report. In general, it prohibits sex discrimination in educational programs and activities receiving federal assistance. In 1975, the Department of Health, Education, and Welfare (HEW) issued regulations governing the operation of federally funded education programs. These regulations, now administered by the Department of Education, interpreted the statute to extend to employment practices. Litigation challenging that interpretation terminated in the decision by the Supreme Court in 1982 holding that employment discrimination does come under the prohibitions of Title IX [*North Haven Board of Education* v. *Bell*, 456 U.S. 512 (1982)].

Many issues remain to be clarified, however, and they must await further litigation. Among them, the following are the most important for college and university administrators: (1) Do the prohibitions of Title IX bar employment practices that are not made unlawful by Title VII? (2) Does Title IX apply to any college or university or to any situations in which colleges or universities might find themselves that are not covered by Title VII?

The Equal Pay Act

As originally enacted, the Equal Pay Act of 1963 [29 U.S.C. §206(d) (1976)] contained an exemption for "any employee employed in a bona fide executive, administrative, or professional capacity, including . . . academic administrative personnel or teachers in elementary or secondary schools." The 92nd Congress removed this exemption in 1972. Before then, the Equal Pay Act applied only to nonprofessional employees of colleges and universities like dormitory custodians [*Hodgson* v. *Waynesburg College*, 3 E.P.D. 8343 (W.D. Pa. 1971)]. Since the removal of that exemption, the act applies to all employees of colleges and universities.

This amendment to the Fair Labor Standards Act provides that:

> *No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex*

in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and that are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system that measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee [29 U.S.C. §206(d)(1) (1976)].

The statute contains three main provisions: the equal-pay-for-equal-work formula, the four affirmative defenses, and the limitation on remedies. To prevail under this act, a plaintiff must show that women are paid less than men to perform jobs that are equal in skill, effort, and responsibility and performed under similar working conditions, and must rebut arguments of the defendant purporting to show that the difference in pay results from one or more of the four exceptions listed in the statute.

Executive Order No. 11246

In a further effort to eliminate discrimination from the area of employment, President Johnson issued Executive Order No. 11246 in 1965 [42 U.S.C. §2000e (1976)] that federal contractors undertake a contractual obligation to take affirmative action to ensure that discriminatory employment practices are discontinued. In 1967, he added "sex" as a prohibited basis of discrimination (Executive Order No. 11375). A contractor must agree, during the performance of a contract, not to:

(1) . . . discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin.

Supervision of compliance with this contract clause originally fell upon the contracting agency of the federal gov-

ernment. The Department of Health, Education, and Welfare was the contracting agency for most contracts with colleges and universities, but it did not begin to assert the applicability of this executive order to colleges and universities until late 1972 [37 Fed. Reg. 24686 (1972)].

The Rise and Fall of Limited Judicial Review

The legislative and executive branches of the federal government regard the obligations of colleges and universities to avoid sex discrimination in employment as the same as those of any other employer. The literature on education law, however, continues to debate whether the courts afford colleges and universities special deference in these matters (Hendrickson and Lee 1983; Kramer 1982; Roukis, Halpern, and Zeichner 1983; Vanderwaerdt 1981; Vladeck 1981). A brief review of key court decisions shows that the courts now take the same attitude as the other branches of government.

As litigation under Title VII reached the circuit court of appeals level, the courts expressed reluctance to treat colleges and universities the same as other employers, just as the legislative and executive branches had done before 1972. In 1973, the Supreme Court developed a specific standard for applying Title VII to employers [*McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973)]. From then until 1978, however, courts generally refused to submit university employment decisions to the *McDonnell Douglas* standard of proof, preferring instead to endorse the proposition that courts should exercise minimal scrutiny over the employment practices of colleges and universities. By the end of the decade, this deferential posture declined sharply.

Deference

The courts were initially reluctant to become embroiled in the employment disputes involving academics because they recognized the inevitably subjective nature of employment decisions in colleges and universities. Noting the heavy emphasis on subjective judgment in decisions affecting recruitment, compensation, promotion, and termination at universities, the Second Circuit Court of Appeals declared, in a now-famous opinion, that ". . . of all fields which the federal courts should hesitate to invade and take

over, education and faculty appointments at a university level are probably the least suited for federal court supervision" [*Faro* v. *New York University*, 502 F.2d 1229 (2d Cir. 1974), p. 1231]. The court adopted that attitude to avoid becoming involved in what it called " 'I'm just as good as you are' arguments." Other courts later expressed similar sentiments. For example, disclaiming qualification to review university decisions, one district court proclaimed that ". . . the court will not serve as a Super Tenure Review Committee" [*Keddie* v. *Pennsylvania State University*, 412 F. Supp. 1264 (M.D. Pa. 1976), p. 1270].

Challenge

In 1978, the grip of the *Faro* posture was challenged. A federal district court in New Hampshire had found a college in violation of Title VII because of sex discrimination against a female professor. The district court had, contrary to the lesson of *Faro*, applied the *McDonnell Douglas* standard to a college. The First Circuit Court affirmed the decision, noting that in a college setting, where the level of sophistication is higher than in other employment situations, direct evidence of sex discrimination will rarely be available. The court went on to caution against the "hands off" posture endorsed by *Faro* and other courts:

> *. . .[W]e caution against permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by the Congress. That responsibility is simply to provide a forum for the litigation of complaints of sex discrimination in institutions of higher learning as readily as for other Title VII suits* [*Sweeney* v. *Board of Trustees of Keene State College*, 569 F.2d 169 (1st Cir. 1978), p. 176].

Retreat

Later in the same year, the Second Circuit Court took that point. Although mindful of relative institutional competence, the court agreed that the *Faro* posture had been pressed too far and proceeded to apply the *McDonnell Douglas* standard to a university case. It added one clarification relevant to *Keddie*, however: " . . . [T]he law does not require . . . that employment be rational, wise, or well-

considered—only that it be nondiscriminatory" [*Powell* v. *Syracuse University*, 580 F.2d 1150 (2d Cir. 1978), pp. 1156–57].

One year later, a district court in Minnesota refused to grant a motion to dismiss a female faculty member's charge under Title VII. Applying the *McDonnell Douglas* standard, the court found that she had made out a prima facie case of a violation [*Rajender* v. *University of Minnesota*, 20 E.P.D. 30,225 (D. Minn. 1979)].

In 1980, the Third Circuit Court of Appeals laid to rest a more limited form of judicial deference. Although affirming the lower court's finding of a violation and the selection of remedies, the Third Circuit corrected the lower court for its mistaken view that, where denial of tenure is at issue, the plaintiff must introduce more proof of a violation than would otherwise be required.

> *We see nothing in the Supreme Court decisions which permits the trial courts to require any additional proof by Title VII plaintiffs because the relevant employment decision has been made within the confines of an academic institution* [*Kunda* v. *Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980), p. 545].

Deliberations by faculty review committees

Before 1979, colleges and universities could be secure in the belief that the results of internal, confidential faculty review and evaluation were immune from the courts' scrutiny under Title VII. Until then, courts were inclined to defer to the judgment of professionals. But again, a decline in the courts' deferential posture is apparent.

Courts have long recognized the importance of hiring, promoting, and granting tenure to the best-qualified candidates. They have also recognized that peer review is the most reliable means of identifying the candidates who are qualified to receive tenure [*Johnson* v. *University of Pittsburgh*, 435 F. Supp. 1328 (W.D. Pa. 1977)]. The Third Circuit reiterated this same posture in 1980, however, with this proviso:

> *Determination about such matters as teaching ability, research scholarship, and professional stature are subjective, and* unless *they can be shown to have been used*

as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges (emphasis added) (*Kunda v. Muhlenberg College*, p. 548).

Plaintiffs must be allowed to introduce any evidence relevant to their allegations of discrimination. Not infrequently, they allege they were discriminated against by a faculty review committee's decision. On those occasions, courts review the committees' motivations to determine not whether their decisions were correct but whether they were motivated by considerations forbidden by Title VII (Corngold 1983). Upon examining the deliberations of the review committee in *Sweeney v. Board of Trustees of Keene State College* [604 F.2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980)], the First Circuit Court found that sufficient discriminatory animus was operative to warrant the finding of a violation.

A decline in the courts' deferential posture [towards faculty review committees] is apparent.

By the end of the decade, the view that courts hold colleges and universities to a different standard of nondiscrimination than they do other employers was in rapid decline. Some commentators continue to urge that special deference should be retained as a protection of academic freedom (Kramer 1982). That proposal, however, has yet to gain the courts' acceptance.

Liability under Title VII

The liability of employers for violations of Title VII is of course decided in trials of complaints entered by aggrieved parties. The structure of these proceedings, which is crucial to a grasp of the liability of colleges and universities for discrimination in employment, has been refined considerably over the last decade. A few of those refinements are relevant to this discussion.

Courts have developed two methods for analyzing claims under Title VII: "disparate impact" and "disparate treatment." The order of proof in both is comprised of three steps: the prima facie case, the rebuttal, and the pretext steps. These steps are distinguished by the location of the burden of proof. In the prima facie case, the plaintiff has the burden. If she fails to meet that burden, the court

finds for the defendant. If she meets it, the burden shifts to the defendant to rebut. If the defendant fails, the court finds for the plaintiff. If the defendant meets it, the burden shifts to the plaintiff, who may then attempt to show pretext. If she succeeds, the court finds for her; if not, it finds for the defendant.

Although both the disparate impact and disparate treatment methods of analysis involve the same three steps, they differ in the burdens imposed on the parties at each step. Under disparate treatment, the plaintiff must show that she was intentionally deprived of an employment benefit because of her sex. Also under disparate treatment, the defendant may rebut merely by articulating a nondiscriminatory reason for the challenged practice. Under disparate impact, however, rebuttal requires proof of business necessity.

Disparate impact

Court decisions applying disparate impact analysis are typically class action suits challenging a particular employment practice that has affected or might affect many employees or applicants for employment. An example of such a practice is minimum height and weight requirements for a job classification. Such a requirement would tend to exclude more women than men because women as a group are shorter and lighter than men as a group.

A review of the order of proof involved in disparate impact provides a convenient overview of that type of analysis. To establish her prima facie case in such suits, the plaintiff must show that the challenged employment practice, although neutral on its face with regard to sex, tends, when used, to disproportionately disadvantage women as a group. Evidence that the employer used a practice such as minimum height and weight requirements is usually sufficient to establish a prima facie case.

Once the prima facie case is established, the defendant must rebut or lose. To rebut, the employer must show that the use of the challenged practice has a "manifest relationship to the employment in question" [*Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), p. 432]. An employer might defend the use of a minimum height and weight requirement by showing that the job in question could not be

safely and efficiently performed by anyone shorter or lighter.

If the defendant meets the burden of rebuttal, the plaintiff may yet prevail if she shows that the defendant's claim of business necessity is a pretext. She can do so by showing that some other selection device is available that would serve the employer's legitimate interests and at the same time burden women less severely (*Dothard* v. *Rawlinson* 1977).

Guidance for college and university administrators who wish to avoid liability established by the disparate impact method of analysis takes various forms. It seems clear, for example, that requiring experience as a school administrator for a professor of educational administration is a clear example of an employment practice that would fail the disparate impact test.

Courts have shed some light on the scope of the business necessity defense for schools and colleges. One district court decided that the requirement of a Ph.D. for reappointment to the rank of instructor in a department of mathematics is a valid requirement, even though it adversely affects women candidates [*Campbell* v. *Ramsay*, 484 F. Supp. 190 (E.D. Ark. 1980)]. The Ninth Circuit held that a mandatory maternity leave for teachers that begins not later than the first day of the ninth month of pregnancy is a business necessity justified by the safe and efficient operation of a school district [*deLaurier* v. *San Diego Unified School District*, 588 F.2d 674 (9th Cir. 1978)].

In an effort to assist employers apply the lessons of *Griggs* and *Dothard* to their own situations, the Equal Employment Opportunity Commission (EEOC) published *Uniform Guidelines on Employee Selection Procedures* (29 C.F.R. 1607) in 1978. These guidelines delineate several ways in which employee selection procedures that adversely affect women can be validated, that is, can be shown to be necessary for the employment in question (see, for example, Runyan 1980).

Disparate treatment

Most employment cases involving colleges and universities have been analyzed by the disparate treatment method—and plaintiffs have lost most of the cases, partly because

cases analyzed under disparate treatment pose many more difficulties for the plaintiff than do those analyzed under disparate impact. Under disparate treatment, the plaintiff must show that the employer intentionally deprived her of an employment benefit because of her sex. Proof of intentional discrimination is more demanding than proof of disparate impact. Furthermore, cases analyzed under disparate treatment ordinarily involve only an individual plaintiff. Unlike class action suits, individual plaintiffs have access only to those materials held by the defendant that are relevant to her individual case. The combined results of these added difficulties go a long way toward explaining why most plaintiffs lose in employment suits against colleges and universities.

Once again, a review of the order of proof provides an overview of one of the major modes of analysis used in Title VII litigation. The order and allocation of proof in these cases, first set forth in *McDonnell Douglas*, recently received exhaustive discussion in *Texas Department of Community Affairs* v. *Burdine* [450 U.S. 248 (1981)]. To establish a prima facie case under the disparate treatment method, the plaintiff must prove that she applied for an available position for which she was qualified, but was rejected in circumstances that give rise to an inference of unlawful discrimination. The plaintiff's burden here is not onerous. All she is required to do is to eliminate the most common nondiscriminatory reasons for her rejection; for example, the position was not available, she did not apply, or she was not at least basically qualified.

If the plaintiff succeeds in making her prima facie case, the defendant must rebut the inference of discrimination by asserting that the plaintiff was rejected or that someone else was selected instead of her for legitimate, nondiscriminatory reasons. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient that the defendant's articulated reasons raise a genuine issue of fact as to whether it discriminated against the plaintiff. The employer may simply assert that the more qualified applicant was hired. The factual issue, however, must be set forth with sufficient clarity and specificity to give the plaintiff a full and fair opportunity to demonstrate that the proffered reasons were pretextual.

If the defendant succeeds in articulating legitimate and nondiscriminatory reasons for the plaintiff's rejection, the plaintiff then has the burden of demonstrating that the proffered reasons were merely pretextual, that is, used by the employer to disguise intentional sex discrimination. She may do so in one of two ways. She may prove pretext *directly*, by persuading the court that the employer was more likely to have been motivated by discriminatory reasons than the ones articulated, or *indirectly*, by showing that the proffered explanation is unworthy of credence by the court.

Decisions Affecting Hiring, Retention, Promotion, and Tenure

The employment decisions discussed in this section touch faculty most deeply. These are the decisions, when they go against faculty, most likely to occasion litigation. Challenges alleging sex discrimination to these decisions have typically been brought under Title VII and analyzed under the disparate treatment method. Decisions in these key cases are most conveniently treated following the order of proof discussed previously.

The prima facie case

The plaintiff's burden here is relatively light. All she must do is to introduce evidence that eliminates the most common nondiscriminatory reasons for her rejection. In 1980, the Fourth Circuit Court of Appeals developed a four-part interpretation of the *McDonnell Douglas* standard [*Smith* v. *University of North Carolina*, 632 F.2d 316 (4th Cir. 1980)]. This four-element approach to the prima facie case provides a useful format for discussion of other decisions. The *Smith* court declared that a prima facie case must establish each of the following points: (1) that the plaintiff is a member of a class protected by Title VII; (2) that the plaintiff was qualified for the position applied for; (3) that the plaintiff was denied that position; and (4) that others who had qualifications similar to the plaintiff's achieved the position.

Other courts have shed useful light on the second and fourth of these elements. The Second Circuit, in *Lieberman* v. *Gant* [630 F.2d 60 (2d Cir. 1980)], observed that the

qualifications at issue in both elements are those required by the position actually denied the plaintiff. It further observed that qualifications for the consideration of tenure are typically higher than those for making or renewing an appointment. The Second Circuit, in *Powell* v. *Syracuse University,* held that to make out a prima facie case, the plaintiff needs to show only that she possessed the basic qualifications for the position, not that she is the best qualified among potential recipients. The Ninth Circuit, in *Lynn* v. *Regents of the University of California* [656 F.2d 1337 (9th Cir. 1981), *cert. denied,* 103 S. Ct. 53 (1982)], held that the plaintiff satisfied the second element by evidence showing "that she had the same education, experience, and number of published works as others who had been granted tenure" (p. 1342). In the same case, the court also held that the fourth element mentioned in *Smith* v. *University of North Carolina* can be satisfied by general statistics that show the university's "underutilization" of women faculty.

Rebuttal

Colleges and universities have successfully met their burden of rebuttal on several grounds. The Ninth Circuit held in *Lynn* v. *Regents of the University of California* that a faculty review committee's finding of inadequate scholarship in a case where the plaintiff was given timely warnings of the problem was sufficient to meet the burden of rebuttal [see also *LaBorde* v. *Regents of the University of California,* 686 F.2d 715 (9th Cir. 1982), *cert. denied,* 51 U.S.L.W. 3552 (Jan. 24, 1983)]. The Second Circuit held in *Powell* v. *Syracuse University* that a faculty review committee's finding of inadequate teaching performance was sufficient to meet the burden of rebuttal (see also *Lieberman* v. *Gant* and *Smith* v. *University of North Carolina*). The Fourth Circuit held, in *Lewis* v. *Piedmont Community College* [30 E.P.D. 33,087 (4th Cir. 1982)], that the defendant's claim that the plaintiff was less well qualified in terms of formal education than the person granted the position was sufficient to meet the defendant's burden of rebuttal. In dicta, the Third Circuit stated in *Kunda* v. *Muhlenberg College* that the following reasons would also meet the burden of rebuttal: anticipated decline in enrollment, retrenchment for budgetary reasons, termination of some departments,

or determination that other priorities elsewhere are higher. As indicated, the defendant's burden of rebuttal in disparate treatment cases is relatively light and can easily be met. Even so, the explanation given in rebuttal is not insignificant. To the contrary, if the defendant is not careful to accurately and truthfully state the real reasons for the adverse decision, it may well, in the pretext stage, be hoist with its own petard.

Pretext

In a number of cases, plaintiffs have successfully showed pretext both by direct and by indirect evidence. Direct evidence shows that the employment decision was more likely to have been motivated by sexually discriminatory reasons than by the proffered reasons. Several plaintiffs have established pretext by direct evidence tending to show that the challenged decision was motivated by sexual stereotypes. The Ninth Circuit found pretext in *Lynn* v. *Regents of the University of California* because the university showed "a disdain for women's issues, and a diminished opinion of those who concentrate on those issues . . ." (p. 1343). In *Sweeney* v. *Board of Trustees*, the First Circuit found pretext on the basis of evidence indicating that the reasons for denial of promotion bordered on describing the plaintiff as a "schoolmarm" (1979, p. 112). The Eighth Circuit found pretext on the basis of sexist remarks made by a male member of a faculty search committee [*Craik* v. *Minnesota State University Board*, 33 E.P.D. 34,252 (8th Cir. 1984)]. A district court in Colorado found pretext on the basis of evidence of retaliation against the plaintiff for her attempts to advance the cause of women's intercollegiate athletic competition and evidence that indicated her peers tended to view her department as a masculine domain. In that case, the judge was persuaded that the plaintiff was treated more as a symbol of her sex than as a member of the faculty and that she suffered from that perception [*Hill* v. *Nettleton*, 455 F. Supp. 514 (D. Colo. 1978)].

Plaintiffs have also successfully shown pretext on the basis of indirect evidence, proving that the reasons articulated by colleges and universities were not worthy of belief by the court. The district court in *Hill* v. *Nettleton* found pretext on the basis of evidence showing that the univer-

sity programmed the plaintiff for failure by coercing an agreement from her to complete the requirements for a Ph.D. within four months, a degree that was not even reasonably related to the duties of her position as an athletic administrator and coach. The First Circuit Court held that pretext was established by evidence showing that the college imposed stricter standards upon female faculty than on male faculty applicants (*Sweeney* v. *Board of Trustees* 1979). The Third Circuit in *Kunda* v. *Muhlenberg College* found evidence sufficient for pretext when it was shown that male peers in her department were counseled about the requirement for the M.A. degree as a requisite for tenure whereas the plaintiff was not so counseled. In a school case, the Eighth Circuit found that pretext was shown by evidence indicating that the job description of the position for which the plaintiff had applied was tailored to fit only one applicant, who was male [*Coble* v. *Hot Springs School District No. 6*, 682 F.2d 721 (8th Cir. 1982)]. In *Craik* v. *Minnesota State*, the Eighth Circuit found pretext on grounds that the university failed to comply with the provisions of a voluntary affirmative action plan and to promptly investigate complaints of sexual bias in the selection of department chairs.

Clearly, pretext is the crucial phase of disparate treatment cases: The plaintiff tries to persuade the court that the defendant's proffered explanation is only a ruse used to disguise sexual bias. During the pretext phase, what might otherwise appear to be merely tasteless remarks or unfortunate oversights can make a damaging case for the plaintiff. Until recently, college and university administrators could feel confident that such indiscretions could be hidden from the view of courts by a claim of confidentiality. But that too has changed.

Discovery of confidential faculty evaluations

Under rule 26 of the *Federal Rules of Civil Procedure*, litigants may obtain vital information held by the adversary party relating to any matter, not privileged, that is relevant to the subject matter involved in the case, unless otherwise limited by the court by means of a protective order. When issuing or withholding such protective orders, courts are generally required to balance, case by case, the public's interest in ascertaining the truth against the defendant's

interest in confidentiality. In academic cases, an additional balance must be considered: the public policy against discrimination in employment versus the university's interest in academic freedom. In all cases decided in federal circuit courts in which this issue was squarely joined, protective orders were rejected and the institution required to produce the requested information (Corngold 1983).

The earliest decision was made on a relatively narrow question. In 1980, the Fifth Circuit held that when a university accused of discrimination in employment defends itself on the grounds that the decision in question was based upon evaluations that involved criteria unrelated to sex, the plaintiff is entitled to obtain those evaluations [*Jepsen* v. *Florida Board of Regents*, 610 F.2d 1379 (5th Cir. 1980); *Lynn* v. *Regents of the University of California* 1981]. A year later, the same court endorsed a very broad principle of disclosure. In a widely publicized case, the Fifth Circuit held that no compelling basis exists for privilege in these matters on grounds of academic freedom *or* of confidentiality [*In re: Dinnan*, 661 F.2d 426 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 2904 (1982)]. The Second Circuit took a more balanced approach. In 1982, it held that when a university defends itself on the basis of a review committee's decision, the plaintiff is entitled to know the votes and the reasons for the votes in that committee, unless the reasons have been made available upon request at the time the decision was reached [*Gray* v. *Board of Higher Education of the City of New York*, 692 F.2d 901 (2d Cir. 1982)].

Although individual plaintiffs find it more difficult to prevail than class action plaintiffs, largely because of the more limited scope of discovery, they are not without resources to find damaging evidence. The burden of proof on the plaintiff is quite light until the final step. When attempting to establish that the defendant's proffered reasons are pretextual, even an individual plaintiff can have access to the deliberations—or at least the votes—of the review committee if she alleges that the committee discriminated against her because of her sex.

Academic personnel decisions typically involve action by both faculty review committees and administrators. Colleges and universities have incurred liability because of careless action on the part of both. One way to reduce the risk of liability for discrimination in employment decisions

is to carefully select and equally carefully train those who will play key roles in personnel decisions. No doubt administrators have been subject to such careful screening, but members of faculty review committees should also undergo it. Those known to resist the full integration of women into the life of the college or university should be passed over for appointment. Chairmanship of these committees should be given to people known to support the full integration of women on equal terms with men. And members of the committees should be carefully instructed on how to meet their charge and at the same time to comply with the requirements of the law.

Salary

> *Unlike decisions about promotion or tenure, . . . where administrators and faculty at many colleges have recognized the need for consistent and carefully documented procedures, the procedures used to make salary determinations are frequently unwritten, ad hoc, and inconsistent from one department to another and from one year to the next* (Hendrickson and Lee 1983, p. 45).

This casual approach to the administration of salaries has occasioned a sizable volume of court challenges. Again, most have been unsuccessful, attributable mainly to the restrictions placed on the legal obligations to avoid sex discrimination in the area of wages and salaries.

Discrimination on the basis of sex in the area of wages and salaries is actionable under both the Equal Pay Act and under Title VII. This dual coverage has been a source of some confusion. The Supreme Court resolved some of the confusion in 1981, when it held that Title VII incorporates the affirmative defenses of the Equal Pay Act but is not limited to the equal-pay-for-equal-work formula of that act [*County of Washington* v. *Gunther*, 452 U.S. 161 (1981)]. Although the practical implications of that decision are not yet clear, it does not disturb the settled practice of courts when plaintiffs *do* invoke the equal-pay-for-equal-work formula.

Colleges and universities that do not have merit systems of salary administration or that do but do not administer them in an orderly and objective way are certainly more vulnerable to challenge under the Equal Pay Act than are

those that do (Koch 1982). The Rhode Island School of Design lost a decision because its haphazard system of salary administration resulted in unequal pay for equal work for one of its female faculty members [*Melanson* v. *Rantoul*, 536 F. Supp. 271 (D. R.I. 1982)].

Notwithstanding the clarity of the obligation imposed by the Equal Pay Act and Title VII, plaintiffs who bring charges of salary discrimination against colleges and universities seldom prevail. Perhaps this situation is best explained by the burden of proof that plaintiffs must bear in these cases (Koch 1982). To prevail, the plaintiff must establish two claims. She must first show that she was paid less for a job whose actual performance required substantially equal skill, effort, and responsibility as one performed by a better-paid man. Plaintiffs most frequently fail to meet this first requirement. They typically compare their jobs to others held by better-paid men whose jobs require greater skill or entail more effort and responsibility.

The Fifth Circuit recently identified a novel way to satisfy this first requirement [*Berry* v. *Board of Supervisors of L.S.U.*, 715 F.2d 971 (5th Cir. 1983)]. The plaintiff's suit, brought under the Equal Pay Act, was dismissed in the district court but reinstated on appeal. She complained that the university had denied her pay equal to other associate professors by assigning her twice the courseload they carried. The circuit court found that she stated a genuine claim under the act, because the extra courseload prevented the plaintiff's taking a second job for extra pay, an option enjoyed by her male peers.

Plaintiffs who bring charges of salary discrimination against colleges and universities seldom prevail.

Those who do meet this first requirement seldom meet the second as well, that is, showing that the salary differences between the jobs are not attributable to one of the affirmative defenses, especially a "factor other than sex." *Horner* v. *Mary Institute* [613 F.2d 706 (8th Cir. 1980)] illustrates both of these difficulties. The work actually performed by the physical education instructor to whom the plaintiff compared herself was found to be not substantially equal in skill and responsibility to her position. In addition, the higher salary paid the male because he could command a higher salary elsewhere was found to be based on a "factor other than sex."

In *Orahood* v. *Board of Trustees of the University of Arkansas* [645 F.2d 651 (8th Cir. 1981)], the Eighth Circuit

held that the responsibilities of an acting director in the Office of Institutional Studies were not substantially equal to those of the acting director in the Controller's Office because the latter supervised more people and had the authority to hire and fire. The court went on to observe, however, that the plaintiff would have established a prima facie case had she alleged that the university paid men who temporarily served as acting directors of offices an extra salary increment but did not pay that extra increment to similarly situated women.

In *Wilkins* v. *University of Houston* [654 F.2d 388 (5th Cir. 1981), *vacated and remanded*, 72 L.Ed.2d 66 (1982), *cert. denied*, 103 S. Ct. 51 (1983)], the Fifth Circuit ruled that the low-level administrative position held by the plaintiff in the computer lab was not substantially equal to that of the higher-paid male computer technician because the latter position required much greater skill. The court, however, did find a violation on other grounds. The university had adopted a universitywide plan to remedy sexually discriminatory compensation practices, which provided minimum and maximum salaries for each job category. A violation was established by evidence showing that a significant number of academic women were paid at rates below the minimum indicated by the plan, that the jobs of many women were reclassified once that discrepancy was discovered, and that only men were paid at the maximum rates.

Role of statistical evidence

> *Statistical analyses have been at the very core of every class action discrimination suit involving faculty salaries that has so far reached decision on the merits. Indeed, the pertinent legal question has not been the centrality of statistical evidence but the necessity of any evidence beyond statistics* (Bodner 1983–84, p. 305).

Since 1971, statistical evidence has played an increasingly important role for both plaintiffs and defendants in Title VII cases (Bodner 1983–84; Bompey and Saltman 1982–83; Connolly and Peterson 1980; Hay 1978; Hendrickson and Lee 1983; Koch 1982). In that year, the Supreme Court held in *Griggs* v. *Duke Power Company* that the plaintiffs in a class action had established a prima facie case of dis-

crimination by showing that the challenged employment practices had a disproportionate adverse effect upon blacks. Because intent need not be shown when the disparate impact method of analysis is used, the plaintiff can meet her initial burden by a relatively straightforward comparison of the actual results with the predictable results of a sex-neutral procedure. A significant difference that works to the disadvantage of the plaintiff class establishes a prima facie case of sex discrimination (*Dothard* v. *Rawlinson* 1977).

The basic idea behind this statistical technique is quite familiar and widely used. To obtain a random selection from an urn containing red, green, and blue marbles in known proportions, one might blindfold a selector and instruct him to pick the requisite number of marbles from the jar. One way to determine whether the blindfold was secure is to compare the proportions of red, green, and blue marbles selected with their proportions in the urn. A significant variance is solid evidence that the selection was not color-neutral.

Central to this technique is the concept of parity. Any selection procedure that gives no weight to the color of the marbles will generate results that match, or are in parity with, the population from which the selection was made. One straightforward application of the concept of parity is the by-now familiar concept of underutilization, that is, the situation in which fewer minorities or women participate in a particular job group than would reasonably be expected based on their availability. The Ninth Circuit Court of Appeals accepted evidence of underutilization of women on the faculty as evidence in support of a prima facie case under Title VII (*Lynn* v. *Regents of the University of California* 1981).

The concepts of parity and underutilization are especially important in disparate impact analysis of Title VII cases. Much more sophisticated statistical techniques have been developed under the disparate treatment theory of liability in Title VII cases, especially those relating to salary issues. In such cases, individual plaintiffs must show that the defendant intentionally deprived her of employment benefits because of her sex (*Texas Department of Community Affairs* v. *Burdine* 1981). Plaintiffs, however, need not show intent by direct evidence. It is sufficient that

they show intent indirectly. The role of statistics as a method of indirectly proving intent is fast becoming extremely sophisticated (Koch 1982). Plaintiffs are increasingly required to use multiple regression analysis (see Bodner 1983–84; Finkelstein 1980; Fisher 1980).

When sex discrimination in salary matters is disputed, multiple regression analysis is almost always required, because affirmative defenses of the Equal Pay Act have become part of the requirements of Title VII (*County of Washington* v. *Gunther* 1981). To prevail under either of these statutes, the plaintiff must show that the salary differential disputed is not attributable to a "factor other than sex." Multiple regression analysis is the most reliable technique for establishing this point. The plaintiff classes in two recent cases failed in large part because they neglected to use multiple regression techniques (*Coble* v. *Hot Springs School District No. 6* 1982; *Wilkins* v. *University of Houston* 1981). At the end of its decision in *Wilkins*, the Fifth Circuit appended some advice for future litigants, plaintiffs as well as defendants, that would be well for all to heed:

> *. . .[T]he day is long past . . . when we proceed with any confidence toward broad conclusions from crude and incomplete statistics. That everyone who has eaten bread had died may tell us something about bread, but not very much* (p. 410).

Comparable worth

An alternative approach to equitable pay, currently under development, attempts to exploit the opportunity apparently left open by the Supreme Court in *County of Washington* v. *Gunther*. This approach is called "comparable worth," and it has been widely mentioned in the press. In this approach, the main explanation of the fact that working women as a group earn substantially less than working men as a group is not that employers pay some workers less than others for doing the same jobs because they are women, but that women workers are segregated into different and lower-paying jobs than are typically held by men. The Equal Pay Act does not reach this source of inequitable pay, because it is restricted by the equal-pay-

for-equal-work formula. That source could be reached by Title VII, or so some proponents argue, if the latter statute were interpreted as requiring equal pay for work of comparable worth.

Courts are currently divided on the merit of this approach. In *Briggs* v. *City of Madison* [536 F. Supp. 435 (Wisc. 1982)], the court rejected a claim by public health nurses that they were discriminated against because their salaries were not comparable to those of public health sanitarians. On the other hand, another district court in Washington [*AFSCME* v. *Washington*, 578 F. Supp. 846 (Wash. 1983)] ruled in favor of state and county employees who based their claim on the comparable worth theory of Title VII. (For a review of some of the issues raised by the comparable worth approach, see Gasaway 1981; Joyce 1981; and Treiman and Hartman 1981.)

The availability of the four affirmative defenses of the Equal Pay Act, both for actions brought under that statute and for those brought under Title VII, provides formidable protection for colleges and universities in pay disputes alleging sex discrimination, especially the "factor other than sex." Court decisions that rely largely upon statistical analysis show, however, that even this protection does not create a sanctuary invulnerable to attack. Continued ad hoc administration of salaries increases the risk of liability. At the very least, colleges and universities should review salary administration procedures for signs of gross abuse. Statistical analysis can be invaluable in identifying trouble spots (Bodner 1983–84). If a merit pay system is contemplated (Hendrickson and Lee 1983), whether to remedy existing inequities or for other reasons, great care must be taken to ensure that individual salaries are in fact determined solely by the criteria endorsed by that system.

Benefits

Salary is only one form of compensation afforded faculty and other employees of colleges and universities. Fringe benefits may also be allocated in whole or in part on the basis of sex, and this practice too is prohibited under Title VII. Two types of benefits that concern colleges and universities have been found to violate employers' obligations under that statute.

Retirement programs

In 1978, the Supreme Court held that an employer-sponsored pension plan in which all employees were required to participate violated Title VII [*Los Angeles County Department of Water and Power* v. *Manhart*, 435 U.S. 702 (1978)]. Although the plan made equal payments to retirees, it required higher monthly payments from female employees than from male employees. The Court rejected the argument based on sex-based actuarial tables that women as a group live longer than men as a group and held that Title VII bars sex discrimination even on the basis of true generalizations if they do not apply to the individual discriminated against.

The Court specifically limited its ruling in *Manhart* to employer-operated pension plans requiring unequal contributions. As it stood then, the ruling held little interest for colleges and universities. Later in the same year, however, the First Circuit Court applied the *Manhart* ruling to a TIAA plan sponsored by a college, even though the monthly contributions into the plan were equal (monthly payments to retirees were less for females) [*EEOC* v. *Colby College*, 589 F.2d 1139 (1st Cir. 1978)]. In 1982, two other circuit courts reached opposite decisions on the same question. In *Spirt* v. *TIAA* [691 F.2d 1054 (2d Cir. 1982), *vacated*, 103 S. Ct. 3566 (1983)], the court found the TIAA and CREF plans in violation of Title VII, while in *Peters* v. *Wayne State University* [691 F.2d 235 (6th Cir. 1982), *vacated*, 103 S. Ct. 3566 (1983)], the Sixth Circuit found that they were not in violation of Title VII. The Supreme Court settled the dispute when it ruled in *Arizona Governing Committee* v. *Norris* [77 L.Ed.2d 1236 (1983)] that plans similar to those of TIAA/CREF violate Title VII. TIAA/CREF plans have since been altered to conform to the requirements of this decision.

Maternity benefits

In 1976, the Supreme Court held in *General Electric Co.* v. *Gilbert* [429 U.S. 125 (1976)] that an employer does not violate Title VII by refusing to include pregnancy disability coverage in an otherwise nearly comprehensive disability benefit program. The Court's reason was that, although Title VII does prohibit sex-based discrimination in employ-

ment, it does not prohibit pregnancy-based discrimination. The following year, in *Nashville Gas Co.* v. *Satty* [434 U.S. 136 (1977)], the Supreme Court found an employer who denied employees returning from maternity leave accumulated seniority to be in violation of Title VII.

In 1978, the Ninth Circuit Court applied the lessons of *Gilbert* and *Satty* to a school case *(deLaurier* v. *San Diego Unified School District)* and found that the district's mandatory maternity leave policy requiring teachers to begin leave on the first day of the ninth month of pregnancy was justified as necessary for the safe and efficient operation of the school district and was therefore not in violation of Title VII. The court, however, found merit in the challenge to the school district's refusal to allow teachers to use their sick pay benefits during the period of the leave and remanded the case to the district court to see whether that denial was also a business necessity.

During that same year, Congress enacted the Pregnancy Discrimination Act to offset the result of the *Gilbert* decision. The act extended the prohibition against sex discrimination to include discrimination on the basis of pregnancy, childbirth, and related medical conditions.

The full implications of this act are yet to be worked out. Taken in conjunction with the main provisions of Title VII, it is clear that it is unlawful for an employer to allow decisions affecting hiring, promotion, retention, salary, working conditions, leaves of absence, sabbaticals, and fringe benefits in general to be made even partially on the basis of pregnancy, childbirth, or related medical conditions. In particular, it appears reasonably clear that any employer who provides a reasonably comprehensive medical and disability benefit program for employees must include pregnancy benefits in that coverage. In *Newport News Shipbuilding and Dry Dock Company* v. *EEOC* [77 L.Ed.2d 89 (1983)], the Supreme Court endorsed that interpretation and declared that the Pregnancy Discrimination Act requires equal maternity coverage for female employees and spouses of male employees.

Colleges and universities should take special care to avoid sex discrimination in the design of employee benefit packages. TIAA/CREF has redesigned its plans to conform to the Court's decision. Institutions must be vigilant to avoid bias against individual women in other pension plans

they might sponsor for employees and in other areas, such as leave policy—especially those related to pregnancy.

Working Conditions

"Working conditions" covers a vast array of circumstances, and Title VII applies to all of them. Court decisions in two areas—double standards and sexual harassment—are of special interest.

Double standards

Sex discrimination in working conditions frequently involves applying different standards for evaluating the performance of men and women. Most often, they impose heavier burdens upon women. The following cases illustrate specific practices of this sort that have been found in violation of Title VII.

The most obvious instance of a double standard is the differential treatment of men and women who parent babies out of wedlock. A district court in Delaware found that the plaintiff, a female director of women's residences, who was terminated for that reason had made a sufficient case for a preliminary injunction to block her discharge [*Lewis* v. *Delaware State College*, 455 F. Supp. 239 (D. Del. 1978)]. A district court in Iowa found that a similar discharge violated Title VII because the evidence showed that the school did not treat male teachers who had parented children out of wedlock in the same way [*Dolther* v. *Wahlert High School*, 483 F. Supp. 2[illegible] (D. Iowa 1980)].

As the presence of women on college and university faculties increases and women assert their own interests and those of other women in all aspects of college and university life, resistance often shows itself by the application of dual—or at least different—criteria for employment. They too have been found to violate Title VII. Colorado State University, for example, tried to defend its practice of imposing heavier burdens on a coach of a women's athletic program than upon coaches in men's athletic programs on the ground that the two programs were not comparable. The court sternly rejected the university's defense: "That argument is reflective of the very kind of gender classifications and double standards that have been outlawed by Title VII" (*Hill* v. *Nettleton* 1978, p. 519).

Similarly, the Ninth Circuit held in *Lynn* v. *Regents of the University of California* (1981) that a disdain for women's studies programs and a diminished opinion of those who concentrate their efforts in that field are evidence of a discriminatory attitude toward women.

Sexual harassment

Sexual harassment in colleges and universities has rapidly risen to a high level of visibility and discussion. One bibliography on the topic (Crocker 1982) lists 124 entries. A recent book dealing with sexual harassment of students by faculty (Dziech and Weiner 1984) is relevant here because graduate teaching and research assistants are also employees of the university. Only one case involving an employee has been reported [*Fisher* v. *Flynn*, 598 F.2d 663 (1st Cir. 1979)]. The most helpful single source of clarification of an employer's obligations in this area came in 1980, when the EEOC issued its *Guidelines on Sexual Harassment* (29 C.F.R. 1604.11), which defines "sexual harassment" as follows:

> *Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.*

The public now recognizes that in general sexual activity between supervisors and subordinates can be used as grounds for alleging sexual harassment. Such relationships are generally suspected of satisfying the first or second of the categories in the guidelines. What is not generally recognized is that sexual activity among coworkers can also qualify as sexual harassment under the third category. Excessive verbal inquiries about one's sexual behavior can be found in violation of Title VII on the grounds that it creates a hostile working environment.

Sex discrimination . . . frequently involves applying different standards for evaluating the [work] performance of men and women.

An employer's liability for the sexual harassment suffered by employees varies, depending upon who the harassers are. Under the guidelines, an employer is strictly liable for harassment by supervisors but is liable for harassment of coworkers and nonemployees only if the employer knew or should have known of the harassment and failed to take prompt and effective corrective action.

Courts have adopted slightly different standards of responsibility. The Ninth Circuit, in *Miller* v. *Bank of America* [600 F.2d 211 (9th Cir. 1979)], held the employer to a strict standard of liability for harassment by a supervisor. The Eleventh Circuit, however, refused to impose such a demanding standard, preferring instead to hold the employer liable for the harassing acts of supervisory employees only if the employer knew or should have known of their behavior and failed to take immediate and appropriate corrective action [*Henson* v. *City of Dundee*, 682 F.2d 897 (11th Cir. 1982)]. The Circuit Court of the District of Columbia applied the latter standard in *Bundy* v. *Jackson* [641 F.2d 934 (D.C. Cir. 1981)] where the harasser was a coworker. The guidelines go beyond court decisions in announcing that the employer is responsible for nonemployees' acts of sexual harassment under the same standard that applies to coworkers.

The EEOC commends a course of action to employers: prevention.

> *Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned* (29 C.F.R. 1604.11).

Although colleges and universities are well advised to follow this counsel of prevention, they should not be lulled into complacency by the mere presence of policy statements and grievance procedures. An employee who charges that she has been a victim of sexual harassment for which her employer is responsible is not required to exhaust the grievance procedures provided by the employer as a prerequisite to bringing suit in federal court under

Title VII [*Bundy* v. *Jackson* 1981; *Miller* v. *Bank of America* 1979; see also *Patsy* v. *Board of Regents of the State of Florida*, 457 U.S. 496 (1982)].

The preventive measures suggested by the EEOC appear to be both prudent and cost-efficient. Top college and university officials should raise the issue of sexual harassment, issue a policy statement that both defines and denounces it, provide clear grievance procedures that are convenient and nonthreatening for aggrieved parties to use, and act promptly and credibly on all complaints received. These same measures should be used to identify and correct the use of double standards as they affect employment decisions and working conditions. In each effort, the design and execution of policies and procedures should draw upon the advice of women faculty because they are more likely to be sensitive to the forms in which sexual bias is perceived to occur on the campus.

Affirmative Action

"Affirmative action" is not well defined. It refers to a wide range of equitable remedies that can be used in a variety of contexts. In the context of discrimination in employment, they are used in connection with both Title VII and Executive Order No. 11246. Under Title VII, such remedies have repeatedly withstood constitutional and statutory attack [see *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979)].

The Supreme Court has yet to prescribe a complete set of criteria for distinguishing between permissible and impermissible affirmative action plans. Recently, the Court struck down a decision by a district court that enjoined a fire department from laying off firefighters on the basis of last hired, first fired as required by its seniority system [*Firefighters Local Union No. 1784* v. *Stotts*, 52 U.S.L.W. 4767 (June 12, 1984)]. The lower court believed that the injunction was necessary to protect the gains in minority hiring made under an affirmative action plan previously accepted by the city as part of an out-of-court settlement of a past employment discrimination suit. In that settlement, the city did not concede that it had discriminated against minorities in employment. In overturning the injunction, the Court ruled that affirmative action goals and timetables approved under the authority of Title VII may

not interfere with bona fide seniority systems, unless past discrimination has been shown. Much as *Bakke* had in the area of admissions [*University of California Regents* v. *Bakke*, 438 U.S. 265 (1978)], the *Firefighters* decision shows that in the area of employment, affirmative action when taken to extremes can be successfully challenged. Also like *Bakke*, that decision standing by itself does not signal a general retreat from the courts' consistent support of affirmative remedies under Title VII.

Affirmative action under Executive Order No. 11246, rather than under Title VII, is of particular interest to college and university administrators. The remainder of this section is devoted to affirmative action in that context.

As part of the Great Society, President Johnson undertook to eliminate discrimination in the area of employment. One of his initiatives in support of that objective was to require all federal contractors to agree, as a condition of doing business with the federal government, to include two specific clauses in their federal contracts. By including the first clause, contractors commit themselves to avoiding discrimination against job applicants and employees because of their race, color, religion, sex, or national origin (the equal employment opportunity, or EEO, clause). By including the second clause, contractors commit themselves to "take affirmative action to insure that applicants for employment and employees are treated during employment without regard to their race, color, religion, sex, or national origin" (the affirmative action, or AA, clause).

An EEO clause has been included in the contracts of an increasing number of federal contractors since the presidency of Franklin Roosevelt. But by 1961, it had become clear that relying on contractors' voluntary efforts to live up to the obligations that they incurred under the EEO clause had yielded little measurable improvement in the employment opportunities of the traditional victims of discrimination. During that year, a presidential commission chaired by then–Vice President Richard Nixon concluded that what was lacking under earlier programs was a means of motivating contractors to comply with that obligation. Under Presidents Kennedy and Johnson, the executive branch developed a means for providing just that motivation, first in the form of "Plans for Progress," later in the form of the AA clause.

In an effort to motivate institutions to require that their employees meet the contractors' obligation under the EEO clause, the Department of Labor modeled its approach upon a proven business technique known as a management control system. In such a system, management motivates its agents to act to advance declared objectives by repeated cycles of plans communicated in the form of budgets followed by performance evaluations that compare results with plans.

In regulations popularly known as "Revised Order No. 4" (41 C.F.R. 60-2), the Department of Labor detailed the procedures that contractors are required to follow under the AA clause. The procedures are designed to ensure that the contractors' employees make a good-faith effort to meet the obligation of their employers under the EEO clause. Broadly considered, the regulations require contractors: (1) to design and disseminate an equal employment opportunity policy; (2) to assign internal responsibility for effectively implementing that policy; (3) to design and use internal audit, reporting, and review procedures for monitoring progress in implementing that policy and in identifying residual problem areas; (4) to develop and use internal action programs designed to eliminate those problem areas; and (5) to use external action programs that are useful in eliminating those problem areas.

The regulations provide that different types of problem areas require different types of responses. When the monitoring procedures detect underutilization, that is, "fewer minorities or women in a particular job group than would reasonably be expected by their availability," the contractor must develop internal action programs that set goals and timetables for the elimination of that deficiency. It should be noted, however, that an affirmative action program must include goals and timetables *only* when underutilization has previously been detected.

Although the five main features of all affirmative action programs have been awkward and costly to implement, most litigation and academic controversy has focused upon the use of goals and timetables. The objection—like the response—has always been the same. In decision after decision, affirmative action goals and timetables were attacked, on both constitutional and statutory grounds, because, so the claim went, they require the contracting insti-

tution to grant preferential treatment to blacks, women, and other minorities and so inflict reverse discrimination upon white males. The response of all eight circuits that have heard these arguments has been the same: The arguments are without merit because they rely upon a "false" premise [*Legal Aid Society of Alameda County* v. *Brennan*, 608 F.2d 1319 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980)] or on "pure sophistry" [*Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971)]. The point these courts make is always the same: A goal of parity does not impose an obligation to engage in preferential treatment in favor of anyone. It requires only that the contractor make a good-faith effort to find and use employment practices and procedures that can be shown to be unbiased.

Beginning in 1972, when HEW Secretary Pottinger made the requirements of the executive order applicable to colleges and universities that have contracts with the federal government, faculty members began to resist compliance with the AA clause in much the same way that construction workers had resisted compliance with the Philadelphia Plan, although by academically respectable means. In the end, nothing very new surfaced from this torrent of print, certainly nothing that could be successfully used to challenge the uniform approval of the courts (Lindgren 1981).

Revised Order No. 4, together with the management control system upon which it was modeled, provides the soundest approach for college and university administrators interested in ensuring compliance with the requirements of the EEO and the AA clauses of their contracts with the federal government. The five steps enumerated in the revised order appear to be the safest and most cost-efficient means available to ensure equal employment opportunities for all employees.

Many of the concrete steps suggested by the review of the statutes and cases discussed in this chapter can also be easily incorporated into these five steps. They can be used to eliminate sexual harassment and double standards in working conditions, sexually biased benefit programs, inequitable pay, and sex discrimination in the selection and promotion of personnel. Such a systematic approach ensures that the central administration receives both timely

information and advice and exerts effective control over the direction of institutional growth toward equal employment opportunity. That same systematic approach appears to be cost-efficient as well because it can easily be assimilated into existing methods of institutional planning.

Summary

The primary federal sources of the legal obligation of colleges and universities to avoid sex discrimination in employment are the equal protection clause of the Fourteenth Amendment to the U.S. Constitution, Title VII, the Equal Pay Act, and Executive Order No. 11246. Federal laws prohibiting sex discrimination have been applicable to colleges and universities for just over a decade. Since 1972, when such obligations generally became applicable to colleges and universities, regulations written to apply them and cases decided under them have answered some questions about the specific meaning of these laws for administrators of colleges and universities—but have left others unanswered.

The framework of laws prohibiting sex discrimination in employment intersects with every aspect of employee relations. With respect to decisions about hiring, retention, promotion, and tenure, Title VII is the dominant consideration. Some of the findings of cases considering these themes are of general interest:

1. Relevant qualifications are determined by the requirements of the job.
2. Qualifications for tenure are normally higher than those for reappointment.
3. Plaintiffs need not show that they were the best qualified candidates to prevail in a suit.
4. A finding of inadequate scholarship or teaching performance is a sufficient rebuttal, especially if the plaintiff was given adequate warning about the poor performance.
5. Reliance upon double standards, stereotypes, or outmoded notions about the proper place of women, "women's libbers," and women's studies programs has established violations by showing pretext.

Case law regarding salary considerations indicates that colleges and universities that have merit systems of admin-

istering salaries and administer such a system in an orderly and objective way have minimized their risk under the Equal Pay Act.

Fringe benefits and the conditions and privileges of employment also fall within the scope of laws prohibiting sex discrimination. With the passage of the Pregnancy Discrimination Act of 1978, the status of pregnancy and maternity classifications has become clear. It is now unlawful to base decisions on hiring, retention, promotion, tenure, salary, leaves of absence, sabbaticals, and fringe benefits generally, either entirely or in part upon pregnancy, childbirth, or related medical conditions. Furthermore, employer-sponsored life insurance policies and pension plans may no longer base their payment schedules upon sex-based actuarial tables.

Sexual harassment of employees either by supervisors or by coworkers is grounds for the employer's liability, according to EEOC regulations and the decisions of a number of courts. Colleges and university administrators need not simply be aware of the behavior. It is enough that they *should* have known of it.

Colleges and universities that have contracts with the federal government have a separate obligation to take affirmative steps to provide equal employment opportunities for all employees and applicants for employment. Procedures established by the Department of Labor remain the best guide to safe and cost-efficient compliance. Indeed, full compliance with these regulations is the surest single means to avoid liability under any of the legal sources discussed in this section.

THE LAW ON SEX DISCRIMINATION AGAINST STUDENTS

Sources of Obligation

Unlike the law relating to sex discrimination against employees, which draws predominantly on Title VII, the law on sex discrimination against students draws on several principal sources. Moreover, the law under these sources is not as sharply defined or as fully developed as the law under Title VII.

The equal protection clause

As in other areas of discrimination, the equal protection clause of the Fourteenth Amendment is the constitutional basis for challenging sex discrimination against students, and, like instances relating to sex discrimination in employment, the restriction regarding a state's action limits the applicability of the clause. The obligation created by the equal protection clause reaches all public institutions of higher education, but it does not reach most private institutions. The obligation imposed, as it relates to this discussion, is to refrain from using sex as a classifying criterion unless its use is substantially related to the achievement of an important government interest (*Craig* v. *Boren* 1976).

Title IX of the Education Amendments of 1972

Title IX of the Education Amendments of 1972 (20 U.S.C. §1681) and its regulations (34 C.F.R. 106) contain more specific prohibitions regarding sex discrimination against students. They apply to virtually all institutions that receive federal funds. The central provision of the act states:

> *No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance* [20 U.S.C. §1681(a)].

Title IX regulations require each recipient of federal educational aid to evaluate its policies and practices to determine whether they comply with Title IX. They also require institutions to take whatever steps are necessary to comply so as to end the effects of sex discrimination. Further, they require each institution (1) to adopt and publish

grievance procedures to resolve complaints of sex discrimination, (2) to appoint at least one employee to coordinate the institution's efforts to comply, and (3) to notify students, parents, employees, unions, and professional organizations that the institution does not discriminate on the basis of sex.

Until recently, two questions concerning the applicability of Title IX remained to be resolved: (1) What constitutes the federal financial assistance that triggers recipient status and requires compliance? (2) Does Title IX cover all programs in an institution or only those programs specifically receiving federal dollars? Some institutions tried to escape liability under this act by arguing that they do not receive any direct aid from the federal government, although their students receive grants and loans. This argument failed in *Grove City College* v. *Bell* [687 F.2d 684 (3d Cir. 1982), *aff'd*, 104 S. Ct. 1211 (1984)]. The Third Circuit Court of Appeals ruled that Title IX applies even if the only aid received is financial aid directed to students of the college. In a similar case, *Hillsdale College* v. *H.E.W.* [696 F.2d 418 (6th Cir. 1982)], the Sixth Circuit ruled that a college whose students accepted federal loans and grants was a recipient of those loans and grants for the purpose of Title IX. Unlike *Grove City College* v. *Bell*, however, only the loan and grant program was subject to regulation under Title IX.

In other cases [for example, *Bennett* v. *West Texas State University*, 525 F. Supp. 77 (N.D. Tex. 1981); *Othen* v. *Ann Arbor School Board*, 507 F. Supp. 1376 (E.D. Mich. 1981), *aff'd*, 699 F.2d 309 (6th Cir. 1983); *Rice* v. *President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 102 S. Ct. 1976 (1982); *University of Richmond* v. *Bell*, 543 F. Supp. 321 (E.D. Va. 1982)], federal district courts held that only programs directly receiving federal funds are covered by Title IX. In contrast, the Third Circuit in Pennsylvania rejected Temple University's claim that athletics are not covered by Title IX, maintaining that the legislative history of Title IX clearly proves Congress intended broad coverage [*Haffer* v. *Temple University*, 688 F.2d 14 (3d Cir. 1982)]. Similarly, the Eleventh Circuit recently ruled that Title IX coverage extends to discriminatory practices that affect the entire academic mission of the university [*Iron Arrow Honor Society* v.

Bell, 702 F.2d 549 (11th Cir. 1983), *vacated*, 104 S. Ct. 373 (1983)].

The Supreme Court resolved these questions when it decided Grove City College's appeal [*Grove City College* v. *Bell*, 104 S. Ct. 1211 (1984)], holding that a school's obligation to comply with the requirements of Title IX is triggered by the receipt of any federal financial assistance, even if the only assistance received is in the form of grants and loans to students. In addition, however, the Court went on to rule that the scope of that obligation is limited to the particular program (or programs) within the institution that directly benefits from the aid. Thus, if, as was the case at Grove City College, the only federal aid received is student loans and grants, then only the student financial aid program must comply with the requirements of Title IX.

State statutes and constitutions

Several states have applicable human rights statutes. For example, Oregon has a statute that states:

> *No person in Oregon shall be subjected to discrimination . . . in any higher education program or service, school or interschool activity where the program, service or activity is financed in whole or in part by moneys appropriated by the Legislative Assembly* [ORS 659.150(2)].

Obligation [under Title IX] is limited to the particular program . . . within the institution that directly benefits from [federal] aid.

Sixteen states have equal rights provisions or their equivalents, specifically prohibiting sex discrimination. For example, the Pennsylvania equal rights amendment states:

> *Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual* [Penna. Const. Art. I,28 (1971)].

The degree of scrutiny required under these provisions varies from state to state. In some states, like Pennsylvania, a standard of review stricter than the equal protection standard is required, and the college or university must show a compelling justification for using a classification based on sex.

Admissions

An institution has the right to set its own admissions standards so long as they are administered fairly and do not discriminate on the basis of race, sex, national origin, or handicap. Title IX explicitly prohibits sex as a criterion for admission in "institutions of vocational education, professional education, and graduate higher education, and public institutions of undergraduate higher education." Private undergraduate institutions are exempt. Whole or partial exemptions exist for religious institutions, military institutions, and single-sex public undergraduate institutions.

The Title IX regulations explicitly prohibit several situations:

1. preference or ranking on the basis of sex
2. sex quotas
3. different treatment based on sex
4. use of a test or other criterion that has a disproportionately adverse effect on persons on the basis of sex, unless the test or criterion had been validated and no alternative test without the effect was available
5. rules concerning parental, family, or marital status that are not applied equally to both sexes
6. discrimination or exclusion on the basis of pregnancy or termination of pregnancy because such disabilities are to be treated the same as any other temporary disability
7. preference to applicants from predominantly or exclusively single-sex institutions if the result is discrimination on the basis of sex and
8. discrimination by sex in counseling or guidance of applicants for admission.

Both men and women have challenged single-sex admissions policies. Title IX, however, explicitly exempts the admissions policies of all private and those public undergraduate institutions "that traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex." Thus, successful challenges to single-sex admissions policies have been argued under the equal protection clause and consequently have involved public institutions.

In *Kirstein* v. *Rector and Visitors of University of Virginia* [309 F. Supp. 184 (E.D. Va. 1970)], four female plaintiffs brought suit to compel their admission to the largely all-male University of Virginia at Charlottesville. A federal district court held that, in violation of the equal protection clause of the Fourteenth Amendment, the plaintiffs had been denied their constitutional right, because of their sex, to education equal to that offered men at the University of Virginia at Charlottesville. Specifically, the court stated that:

> *The pattern of separating by sex of educational institutions is a long-established one in America and a system widely and generally accepted until the last decade. Despite this history, it seems clear to us that the Commonwealth of Virginia may not now deny to women, on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the state. Unquestionably, the facilities at Charlottesville do offer courses of instruction that are not available elsewhere. Furthermore, as we have noted, there exists at Charlottesville a "prestige" factor that is not available at other Virginia educational institutions. These particular individual plaintiffs are not in a position, without regard to the type of instruction sought, to go elsewhere without harm to themselves and disruption of their lives* (p. 187).

The court ordered the Charlottesville campus to admit women as well as men until gradually reaching parity in enrollments. But the court declined to extend the ruling to other state higher education institutions segregated by sex.

In contrast, the court upheld the all-female admissions policy of Winthrop College, a public institution in South Carolina. In *Williams* v. *McNair* [316 F. Supp. 134 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971)], males brought suit to enjoin the enforcement of a statute limiting regular admissions to Winthrop College to women. At issue was whether a state system that offers coeducational higher education violates the equal protection clause by limiting admissions to one of its colleges to women. The federal district court in South Carolina stated that "it is only when the discriminatory treatment and the varying standards, as created by

the legislative or administrative classification, are arbitrary and wanting in any rational justification that they offend the equal protection clause" (p. 136). Distinguishing this case from *Kirstein*, the court found that Winthrop College did not offer a wide range of curricula nor enjoy a position of outstanding prestige in the state system. Thus concluding that a rational basis existed for the women-only policy at Winthrop, the lower court held for the defendants, and the Supreme Court affirmed. It is not clear that the *Williams* decision would survive the heightened scrutiny imposed upon sex-based classifications under the equal protection clause since *Reed* v. *Reed* (1971) and *Craig* v. *Boren* (1976), however.

In another case, a male applicant who had been rejected for admission into the University of Oklahoma's Department of Dental Hygiene brought an action under the Civil Rights Act of 1871 (42 U.S.C. §1983) alleging sex discrimination. A federal district court in Oklahoma ruled in favor of the college officials, employing a noticeably deferential standard:

> *University officials should have broad discretionary power to determine the fitness of a student to continue his studies. There is a compelling need and a very strong policy consideration in favor of giving local school officials the widest possible latitude in the management of school affairs. . . . Only when there is a clear and convincing showing that an official acted in an arbitrary and capricious manner will the federal courts interfere with the exercise of such discretionary power. The case at the federal judiciary can perform no greater service . . . than to leave the States unhampered in the performance of their purely local affairs* [*Cortner* v. *Baron*, 404 F. Supp. 316 (W.D. Okla. 1975), p. 319].

The court held that the admissions criteria had been applied fairly to all applicants regardless of sex and that the evidence established the plaintiff's denial was based on his generally poor performance in science courses and on his low motivation compared with that of students selected over him.

Nearly a decade later, the Supreme Court ruled that the refusal of Mississippi University for Women (MUW) to

admit a male applicant into its nursing program violated the equal protection clause of the Fourteenth Amendment [*Mississippi University for Women* v. *Hogan*, 458 U.S. 718 (1982)]. The Court recognized that gender-based classifications may result in invidious discrimination and require an intermediate level of scrutiny.

In *Hogan*, the Court held that the fact that MUW's admissions policy discriminated against males rather than females did not reduce the intermediate standard of scrutiny. The state was required to prove that its admissions policy was substantially related to an important government objective and that a direct relationship existed between that objective and the means adopted to achieve it. The state had claimed that its objective was to compensate for discrimination against women and thus that the admissions policy constituted compensatory action. The Court, however, rejected that argument, observing that there was no lack of opportunities in Mississippi for women to obtain training in nursing and that, in fact, the university's policy perpetuated the stereotyped view of nursing as an exclusively women's job. The Court found that the state had failed to show a relationship between its objective and the challenged admissions policy. In addition, the fact that MUW permitted men to audit its nursing classes undermined the argument that the presence of men in the nursing school would adversely affect women.

Another aspect of the *Hogan* decision bears mentioning. The case raises the question of whether the Court is moving toward declaring sex-segregated schools to be inherently unequal and therefore in violation of the equal protection clause, just as it had with respect to race three decades ago. The Court in *Hogan* specifically avoided this question, however.

The result in *Hogan* is in contrast to that of another recent case in which the court upheld the denial of admission to a male applicant by a nursing program [*Naranjo* v. *Alverno College*, 487 F. Supp. 635 (E.D. Wis. 1980)]. Alverno College's policy was to admit only women to its degree programs. Finding that the college was a private institution not engaged in state action, the federal district court ruled that no constitutional rights were implicated. The court further ruled that there was no cause of action under Title IX, as the college was a private institution of

undergraduate higher education and not an institution of professional education, which would have subjected it to Title IX.

Three other important Title IX questions have been answered in admissions-related cases. In *Cannon* v. *University of Chicago* [441 U.S. 677 (1979)], the Supreme Court found a private right of action under Title IX, thereby enhancing the act's effectiveness. A woman brought suit, claiming she had been denied admission to the medical schools of the University of Chicago and Northwestern University because of her sex. Neither medical school, both of which are private but receive federal financial assistance, admits applicants over 30 years of age without an advanced degree. Cannon held a bachelor's degree and was 39 at the time of her application. She alleged that such a policy operates to exclude women from consideration, because women characteristically are more likely than men to have their higher education interrupted. Upon her appeal, the Supreme Court reversed the lower court's ruling with regard to her standing to sue, finding a private right of action under Title IX.

Cannon's subsequent claim of disparate impact was dismissed, however, on the grounds that she had not proved that the age policies of the two schools were intended to discriminate against women [*Cannon* v. *University of Chicago*, 648 F.2d 1104 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 981 (1981)]. Noting that Title IX was patterned after Title VI of the Civil Rights Act of 1964, which bars discrimination on the basis of race and national origin in federally assisted programs and that recent Supreme Court decisions indicated that a majority of its members believed that Title VI requires an intentional discriminatory act, the Seventh Circuit Court of Appeals took the position that disparate impact alone is not sufficient to establish a violation of Title IX.

In another case involving admission to the medical school of the University of Chicago, the female plaintiff claimed that she was denied admission as a result of sex discrimination and sought declaratory and injunctive relief and compensatory and punitive damages against the defendants [*Lieberman* v. *University of Chicago*, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1993 (1982)]. The Court of Appeals affirmed the federal district court's

ruling that Title IX does not imply a damages remedy to an alleged victim of sex discrimination. As to the request for declaratory relief, the court ruled that the issue was moot because the plaintiff admitted her intention to complete her medical education at Harvard. The Supreme Court declined review of her appeal.

In summary, Title IX bars the use of sex as a criterion for admission by all graduate and professional schools and by most public undergraduate institutions. The broadest exemption to this prohibition is private undergraduate institutions. The obligation may be violated in either of two ways: first, by overtly using sex or gender as a criterion for admission; second, by using other criteria known to have disparate impact upon one sex and doing so because their use has that effect. Public institutions that use sex as a criterion for admission are probably also in violation of the equal protection clause, unless they can persuade the courts that the use of that criterion is substantially related to an important government interest.

Tuition Rates

In *Samuel* v. *University of Pittsburgh* [375 F. Supp. 1119 (W.D. Pa. 1974), *appeal dismissed,* 506 F.2d 355 (3d Cir. 1975), *rev'd decertification of plaintiff class,* 538 F.2d 991 (3d Cir. 1976)], a class of married female students challenged a statewide residency rule that was used to determine tuition rates and that assumed the domicile of a wife to be that of her husband. Using the intermediate review standard of a "rigorous rational basis," the federal district court found the residency rule to be illegal under the Fourteenth Amendment's equal protection clause.

Financial Aid

The Title IX regulations on financial aid are quite specific: They prohibit the use of sex-restricted scholarships and almost every other aspect of sex discrimination in financial assistance. Specifically, these regulations provide that an institution receiving federal funds may not provide different amounts or types of such assistance, limit eligibility for such assistance, apply different criteria, or otherwise discriminate on the basis of sex. An institution is not permitted to assist any foundation, trust, agency, organization, or person that provides assistance to students in a manner

that discriminates on the basis of sex through solicitation, listing, approval, or provision of facilities or other services. Nor may an institution apply a marital or parental rule that discriminates on the basis of sex.

If an endowment contains a restriction as to sex, it must be part of a program in which the overall effect does not discriminate. In other words, financial aid decisions first must be made on the basis of nondiscriminatory criteria, and sex-restricted awards must be allocated to students already selected in such a manner. No one otherwise eligible for financial aid can be denied such aid because he or she is of the wrong sex.

The Title IX regulations also specify, to the extent that an institution awards athletic scholarships or grants-in-aid, the institution must provide reasonable opportunities for such awards to members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

Questions of the classification of men and women for the purpose of awarding financial aid were raised in *Kovach* v. *Middendorf* [424 F. Supp. 72 (D. Del. 1976)]. A female student at the University of Pennsylvania had applied for a Naval ROTC scholarship. Upon being rejected, she claimed violation of her equal protection rights under the Fifth Amendment, as the ROTC scholarship did not fall under the purview of the Fourteenth Amendment or Title IX. Kovach had become ineligible for a scholarship when higher standards were applied to women than men applicants as the result of a congressional classification that limited the number of such scholarships for women. The court ruled that the plaintiff lacked standing to challenge the constitutionality of the program because she had not met all the academic requirements for the scholarship.

In a case concerning scholarship funds provided for by a will, the decision was based upon common law rather than upon constitutional grounds. In *Ebitz* v. *Pioneer National Bank* [364 N.E.2d 225 (Mass. 1977)], the plaintiffs were female law students who had applied for financial assistance from a scholarship fund left in a will "to aid and assist worthy and ambitious young men to acquire a legal education." The Massachusetts Supreme Court affirmed the judgment of the lower court, which held that, in the con-

text of the entire instrument, the phrase "young men" was intended in its generic sense to include young women.

It is difficult to draw any general conclusions from these cases. Colleges and universities should be aware, however, of the constitutional and Title IX constraints in administering financial aid. When scholarships contain outmoded or discriminatory restrictions, institutions should review with legal counsel whether court action should be taken to reform the restrictions or whether the gift or bequest should be returned to the donor's estate.

An issue not related to the administration of financial aid but of critical interest to many institutions is whether institutions of higher education are subject to Title IX merely because they receive federal financial assistance through Pell Grants to their students. The Supreme Court decided in *Grove City College* v. *Bell* (1984) that Title IX does apply to financial aid programs in such cases.

Sexual Harassment

Faculty members have been fired and suspended because of charges of sexual harassment brought by women students *(Chronicle* 1980). and a recently published book details the various ways professors sexually harass students (Dziech and Weiner 1984). An associate professor at San Jose State University was dismissed after five women students accused him of fondling, embracing, and making sexual proprositions to them. At the University of California at Berkeley, an assistant professor was suspended without pay for one quarter after charges of harassment. An associate professor of counseling at San Francisco State University was suspended without pay for a semester for assaulting two students and making sexually suggestive remarks to two others (Association of American Colleges 1981). None of these cases have been judicially reviewed to the point of being a published court decision, however.

In a classroom setting, sexual harassment can be defined as harassment "in which the faculty member covertly or overtly uses the power inherent in the status of a professor to threaten, coerce, or intimidate a student to accept sexual advances or risk reprisal in terms of a grade, recommendation, or even a job" (Weeks 1982, p. V-48). Psychological injury, such as conduct that "has the purpose or

effect of unreasonably interfering with an individual's educational experience or creating an intimidating, hostile, or offensive environment," is more controversial (Weeks 1982, p. V-48) but is also recognized as sexual harassment. Institutional compliance with Title IX requires the development of written and well-publicized policies defining and prohibiting sexual harassment and providing for prompt and equitable resolution of students' complaints.

In addition to Title IX, a complaint of sexual harassment may result in tort liability for both the institution and the individual. The tort involved is intentional infliction of emotional distress. If interpreted as a breach of the terms and conditions of an enrollment contract, students may bring complaints under the common law of contracts (Linenberger 1983; Weeks 1982).

In 1978, former students brought suit under Title IX to redress alleged sexual harassment by faculty at Yale University [*Alexander* v. *Yale University*, 459 F. Supp. 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980)]. In so doing, they alleged sexual harassment by a music instructor, a field hockey coach, and a faculty member, and they attacked the university's lack of established procedures to receive and investigate complaints of sexual harassment. Although Yale University won the case because of the lack of proof of sexual harassment, the district court, in a decision affirmed by the Second Circuit Court of Appeals, declared that:

> *[I]t is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment* (p. 4).

The district court held that the institution may not automatically be held responsible under Title IX for harassment when the student has not complained to the institution. It is a different matter if the institution takes no action or refuses to investigate a complaint, however. The court stated that in those cases, the institution "may sensibly be held responsible for condoning or ratifying the employee's invidiously discriminatory conduct" (p. 4).

Student Organizations

Student organizations are a part of all colleges and universities. In state institutions, the relations of an institution with student organizations are subject to review under the equal protection clause. Institutions covered under Title IX are prohibited from providing significant assistance to organizations that discriminate on the basis of sex, the only exceptions being social fraternities and sororities. For example, a regional office of the United State Office for Civil Rights is reported to have ruled that the University of Michigan discriminated against its women students, in violation of Title IX, by providing support to a 75-year-old, all-male secret society (*Chronicle* 1979).

Institutions covered under Title IX are prohibited from providing significant assistance to organizations that discriminate on the basis of sex.

The Eleventh (formerly the Fifth) Circuit Court of Appeals found that the U.S. Department of Education had the authority to cut off federal funds to the University of Miami because of the support the institution provided to an all-male honor society [*Iron Arrow Honor Society* v. *Schweiker*, 652 F.2d 445 (5th Cir. 1981), *vacated*, 458 U.S. 1102 (1983)]. The Supreme Court vacated that ruling in light of the *North Haven* decision. Two years later, the same circuit court ruled that Title IX applied to that honor society, even though the society had never received any direct federal aid, because the existence of the society as the most prestigious honorary society at the university had a pervasive discriminatory effect upon the university's entire mission [*Iron Arrow Honor Society* v. *Bell* (1983)]. That decision was vacated as moot because the university had in the interval, on its own volition and independently of what the law requires, barred the society from using campus facilities and adopted a policy that requires all student organizations to admit both men and women.

Student Services

Health

Under Title IX, student medical, hospital, accident, or life insurance benefits, services, or plans may not discriminate on the basis of sex. This stipulation does not bar benefits or services that may be used disproportionately by students of one sex (for example, family planning services), however.

In an action concerning the constitutionality of a student health plan, female students challenged the university's

failure to provide Pap tests and gynecological examinations in *Bond* v. *Virginia Polytechnic Institute and State University* [381 F. Supp. 1023 (W.D. Va. 1974)]. The students alleged that the student health plan discriminated on the basis of sex in violation of their rights under the equal protection clause. The district court held that the health plan did not violate equal protection rights because the complaint attacked only the plan's under-inclusiveness. It did not, for example, allege that there were risks from which men were protected and women were not. Under Title IX, which was not at issue in *Bond*, any institution that provides full coverage health care must provide gynecological services, however.

Placement

Twelve women law graduates brought action against one law school, alleging it to be in violation of Title VII of the Civil Rights Act of 1964 because of its placement services [*Kaplowitz* v. *University of Chicago*, 387 F. Supp. 42 (N.D. Ill. 1974)]. The federal district court in Illinois found the law school to be an employment agency within the meaning of Title VII but ruled that it was not required under the act to identify discriminatory firms nor prohibit them from interviewing on campus, so long as it referred all prospective employees, including women, to firms using the placement service.

Child care

In *De La Cruz* v. *Tormey* [582 F.2d 45 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979)], action was brought alleging that the lack of campus child care facilities in a community college district deprived the female students of their equal protection rights. The Ninth Circuit Court of Appeals held that the plaintiffs' complaint alleging disproportionate impact and intentional discrimination adequately stated an equal protection claim.

Housing and Parietal Rules

Under Title IX, institutions are permitted to provide separate housing for men and women. Housing for students of both sexes must be, on the whole, proportionate in quantity to the number of students of that sex that apply for housing, and comparable in quality and cost. Institutions

may not have different housing policies for men and for women. For example, if a college allows men to live off campus, it must also allow women to do so.

Title IX regulations do not specifically deal with parietal rules. The courts have generally upheld parietal rules against equal protection challenges when they purport to promote the welfare of students, even though they treat male and female students differently. For example, a class action suit brought by a female student to challenge dormitory curfew restrictions applicable only to women students at Eastern Kentucky University was defeated [*Robinson* v. *Board of Regents of Eastern Kentucky University*, 475 F.2d 707 (6th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974)]. The Sixth Circuit Court of Appeals held that the goal of safety was a legitimate concern of the board of regents and that its regulations imposing curfew restrictions were rationally related to effectuation of that goal and therefore did not violate the equal protection clause.

The male and female plaintiffs in *Futrell* v. *Ahrens* [540 P.2d 214 (N.M. 1975)] were similarly unsuccessful in challenging the constitutionality of New Mexico State University's prohibition of visits by persons of the opposite sex in bedrooms of university residence halls. The state supreme court held that the regulation was reasonable in that it served legitimate educational purposes, promoted the welfare of the students, and did not infringe upon the federal constitutional rights of privacy and association or the state constitution's equal rights amendment.

Students at a state military college in Georgia unsuccessfully challenged a rule requiring dormitory residence for male students but not for women students [*Williams* v. *Owens*, 245 S.E.2d 638 (Ga. 1978)]. The Georgia Supreme Court ruled that the requirement was rationally related to the college's retention of military status and did not violate the students' constitutional rights. The college also showed that the need for female officers was adequately met through voluntary training of a relatively small number of women.

Athletics

Both the equal protection clause of the Fourteenth Amendment and Title IX have implications for the administration of collegiate athletic programs. The United States Supreme

Court has stated that sex classification must serve an important government objective and must be substantially related to achievement of that objective.

Many lower court cases have dealt with alleged sex discrimination in athletics under the equal protection clause. These suits are usually brought by female student athletes who are precluded from participating on all-male teams. To determine whether constitutional rights have been violated, courts typically focus on the availability of comparable teams for female students and the nature of the sport involved. When the female plaintiff seeks to compete on a men's team in a noncontact sport for which no comparable women's team exists, courts have generally held that the plaintiff must be permitted to try out for the men's team.

Title IX is consistent with this result. The Title IX regulations state that no person may be subjected to discrimination based on sex in any scholastic, intercollegiate, club, or intramural athletics offered by a recipient of federal aid for education. The regulations specifically state that institutions are permitted to provide separate teams for each sex in contact sports or when selection is based on competitive skill. (Contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and any other sport, the purpose or major activity of which involves bodily contact.) In noncontact sports, whenever a school has only one team in a given sport, it may restrict that team to one sex only if members of the excluded sex have not been previously denied athletic opportunities; otherwise members of both sexes must be allowed to try out for the team.

The regulations state that a school must provide equal athletic opportunity for both sexes. In determining whether athletic opportunities are equal, the courts consider whether the selection of sports and the levels of competition effectively accommodate the interests and abilities of members of both sexes. Among the opportunities to be considered are facilities, equipment, supplies, game and practice schedules, travel and per diem allowances, coaching (including the assignment and compensation of coaches), academic tutoring, housing, dining facilities, and publicity. Equal expenditures are not required, but the failure to provide necessary funds for teams of one sex is considered in the assessment of equal opportunity.

An institution that awards athletic scholarships must provide "reasonable opportunities" for both sexes in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics. Separate athletic scholarships for each sex may be offered in connection with all-male or all-female teams to the extent they are consistent with both the regulations on scholarships and the regulations on athletics.

In *Brenden* v. *Independent School District* [477 F.2d 1292 (8th Cir. 1973)], two high school girls who wanted to compete on their school's only cross-country skiing, cross-country running, and tennis teams challenged a league rule prohibiting girls from participation. In affirming the district court decision favoring the girls, the Eighth Circuit Court of Appeals closely scrutinized the sex-based exclusion, stating:

> *We recognize that because sex-based classifications may be based on outdated stereotypes of the nature of males and females, courts must be particularly sensitive to the possibility of invidious discrimination in evaluating them, and must be particularly demanding in ascertaining whether the state has demonstrated a substantial rational basis for the classification* (p. 1300).

The court rejected the argument that women were incapable of competing with men. It noted that the trial court specifically found that the individual plaintiffs were sufficiently skilled to compete on the boys' teams and that, in any event, the school had adopted a no-cut policy that allowed all boys, regardless of skill, to participate in noncontact sports. Even if females as a group are unlikely to compete well against males, the court stated, individual athletes were entitled to "an individualized determination of their qualifications for a benefit provided by the state" (p. 1302). The *Brenden* court's decision did not extend to the question of whether the same result would occur if a separate girls' team were provided or if a contact sport were involved. Its rationale, however, would seem to apply equally well to contact and to noncontact sports.

In *Retacco* v. *Norwin School District* [531 F.2d 922 (8th Cir. 1976)], plaintiffs challenged the state interscholastic athletic association's rule requiring separate girls' and

boys' teams in interscholastic noncontact sports. Although the district court dismissed the case on procedural grounds, it did observe that the rule did not deny equal protection to female students. Applying the test of rational basis, the Eighth Circuit Court of Appeals approved a separate-but-equal approach to female athletes for two reasons. First, the rule actually enhanced the possibilities for females' participation in interscholastic athletics, as providing only one team in every sport would eliminate most girls from competitive opportunities. The court noted that an earlier rule permitting mixed competition resulted in little female participation in interscholastic sports. Second, the court viewed physiological differences between boys and girls, particularly males' superior strength, as a rational basis for requiring separate teams.

On the other hand, in *Commonwealth, Packel* v. *Pennsylvania Interscholastic Athletic Association* [334 A.2d 839 (1975)], the Commonwealth of Pennsylvania initiated suit against the state athletic association, challenging the association's bylaw prohibiting girls from competing or practicing against boys in any athletic contest. The commonwealth court ruled that the bylaw was unconstitutional under Pennsylvania's equal rights amendment. This case differs from the other cases on athletics in three important ways. First, the court deliberately made no distinction between contact and noncontact sports. Second, the court rebuffed the separate-but-equal argument, declaring that such a practice denies girls equality under the law. Third, the court interpreted "[t]he thrust of the Equal Rights Amendment [as ensuring] equality of rights under the law and [eliminating] sex as a basis for distinction" (p. 842).

In *Aiken* v. *Lieuallen* [593 P.2d 1243 (Or. App. 1979)], taxpayers and parents of participants in the University of Oregon's women's varsity basketball program appealed the determination of the chancellor of the state board of higher education that the university was not in violation of a state statute prohibiting sex discrimination by schools receiving funds from the state legislature. The Oregon Court of Appeals held that the chancellor's findings were inadequate and ordered that the chancellor reconsider the allegations.

Of particular interest is the rationale behind some of the findings in *Aiken*. The court noted that a sport's ability to generate revenue is a valid criterion that can be considered

in assessing the reasonableness of a university's actions with respect to men's and women's athletic teams. The court held that athletic conference rules do not immunize a university from liability for discrimination if its treatment of men's and women's athletic teams in such areas as tutoring, officiating, grants-in-aid, and recruitment are discriminatory. The court also noted that the salary level of coaches is a relevant but not necessarily a decisive factor for determining whether an institution discriminates against women's athletic teams. Further, the court identified the different philosophies of competitiveness held by the directors of men's and women's programs as a factor in determining discriminatory impact.

In *Yellow Springs Board of Education* v. *Ohio High School Athletic Assn.* [647 F.2d 651 (6th Cir. 1981)], a local school board in Ohio challenged the state athletic association's rule prohibiting coed teams in contact sports. The Sixth Circuit Court of Appeals held that the rule in question violated Title IX by failing to provide a mechanism for achieving equal athletic opportunity. Inasmuch as Title IX and its regulations are directed to recipients of federal funds, the court concluded that the state association must provide sufficient discretion to the recipient schools to enable them to achieve equal athletic opportunity.

Other Issues

Four cases involving athletics deal with the issue of whether Title IX covers programs not receiving direct federal funding. On that subsidiary issue, the courts are currently divided. Six female students at West Texas State University who participated in the university's intercollegiate athletics program charged the university under Title IX with maintaining various policies and practices that discriminated against women on the basis of sex and denied women equal opportunity in the intercollegiate athletics program (*Bennett* v. *West Texas State University* 1981). The students contended that the athletic program benefits from federal assistance because students receive veterans' benefits, Basic Educational Opportunity Grants, federal work-study program benefits, and other federal financial aid, and that the university receives federal aid for building dormitories and dining halls that particularly benefit athletes. Plaintiffs also claimed the university's athletic

programs are benefited by federal financial assistance because federal funding of other programs makes money available for other activities, including athletics. The district court ruled in favor of the university, asserting that because the program did not directly receive federal financial assistance, it was therefore not covered by Title IX.

This decision is similar to that of *Othen* v. *Ann Arbor School Board* (1981) and marked the second instance in which a judge has ruled that an athletic program was not covered by Title IX because it did not directly receive federal funding. A third decision consistent with this ruling is *University of Richmond* v. *Bell* (1982), in which a private university filed action seeking injunctive and declaratory relief to prevent the Department of Education's investigating its athletic programs. The district court held that the Department of Education had no authority under Title IX to investigate and regulate the athletic program of a private university, when the athletic program itself received no federal financial assistance.

On the other hand, the Third Circuit Court of Appeals rejected Temple University's claim that athletic programs are not covered by Title IX (*Haffer* v. *Temple University* 1982). In that case, eight female athletes alleged in a class action suit that Temple discriminated against females participating in intercollegiate athletics by providing fewer scholarships and facilities, and less equipment and recruitment and financial support. A 1978 faculty senate report had found that without counting money allocated to the school's football program, the budget for men's sports was more than 3½ times the women's budget. The court stated that Temple's athletic department benefited directly and indirectly from other federal aid, such as federal loans and grants. For example, a federally aided radio station assisted the team, and athletes lived in dormitories built with federal funds. The court rejected the reasoning used in *Othen* v. *Ann Arbor School Board*, saying that the legislative history of Title IX clearly proves Congress intended broad coverage.

Another dimension of the implications of Title IX for athletics is indicated by two related cases dealing with the relationship between colleges and universities and athletic associations. In *Pavey* v. *University of Alaska* [490 F. Supp. 1011 (D. Ala. 1980)], the University of Alaska filed a

third-party complaint against two athletic associations seeking a declaratory judgment that the combined effect of the inconsistent rules of the National Collegiate Athletic Association (NCAA) and the Association for Intercollegiate Athletics for Women prohibited the university's complying with the Title IX regulations. The third-party complaint was filed as a result of a suit against the university charging it with discrimination against female students in its athletic programs, in violation of the equal protection clause and Title IX. The district court denied motions by the two associations to dismiss the third-party suit.

In the second case, the NCAA attempted to invalidate Title IX regulations with respect to sex discrimination in athletics [*NCAA* v. *Califano*, 622 F.2d 1382 (10th Cir. 1980)]. The Tenth Circuit, overturning the lower court's ruling, held that, because the members of the NCAA would have standing to sue in their own rights, the NCAA had standing to sue on behalf of its members.

Summary

The primary sources of the legal obligation of colleges and universities to avoid sex discrimination against students are the equal protection clause of the Fourteenth Amendment to the U.S. Constitution and Title IX of the Education Amendments of 1972. The framework of legal requirements intersects with virtually every area concerning students. With respect to admissions, constitutional cases and federal regulations have prohibited single-sex admissions policies in most institutions of higher education; one exception is private undergraduate colleges. Title IX regulations specifically extend to individual cases of sex discrimination, such as exclusion on the basis of pregnancy or marital status.

As for tuition rates and financial aid, equal protection decisions and Title IX regulations have similarly dovetailed to prohibit various, previously prevalent, forms of sexually discriminatory practices, for example, residency rules that presume that the wife's domicile is the same as the husband's. The extent to which scholarships may be restricted to one sex by charitable trusts or for athletic aid is more of a mixed question.

Sex discrimination directed against students by faculty and staff generally translates into sexual harassment. A

body of case law has developed in this area of discrimination, largely as it arises in private industry. Nonetheless, the concept is far from theoretical in its relation to colleges and universities. EEOC's *Guidelines on Sexual Harassment* require the development of written and well-publicized policies and provide a wide basis for institutional liability. The impact of suits brought by students in this area is just beginning to be felt.

Student organizations, with the exception of social fraternities and sororities, similarly come under the umbrella of Title IX. Various cases indicate that a basis exists in the equal protection clause for attacking sex-restricted student organizations like all-male honorary societies. Similarly, various student services, such as health plans, placement services, and child care facilities, have come under increasing attack for not meeting the special needs of female students.

Separate housing facilities and parietal rules for males and females have generally been sustained when they were justified on educational or welfare grounds, although Title IX pushes these rules from a "separate and different" status to a "separate but equal or at least comparable" status. Similarly, the law relating to sex discrimination in athletics generally allows some separation and differentiation of arrangements and alternatives, provided that overall equality of opportunity and proportionality of resources are maintained.

RECOMMENDATIONS

The elimination of sex discrimination from institutions of higher education is mandated by a variety of considerations—educational, moral, sociological, economic, political, and legal. Just as the reasons vary for eradicating sexist practices from colleges and universities, so too do the costs that are risked by failing to do so. This report mentions only the consequences of failing to comply with the legal requirements—expense and disruption.

Educational literature is replete with specific suggestions and concrete proposals for complying with obligations to provide equal employment and equal educational opportunities. Some are included in this report, and others appear elsewhere (see, for example, Scott n.d.; Taylor and Shavlik 1975; Weeks 1982). Even the best of them neglect strategic administrative concerns. As a result, they appear to require additional steps, functions, programs, offices, personnel, and funds.

Rather than rehearse some of the tactical steps college and university officials might take to reduce the risk of liability under antidiscrimination laws, this part proposes three interrelated strategic steps to accomplish that same result. Together, these steps foster compliance with the laws but without the problems of added expense and disruption of the institution's more central functions.

Both administrative and academic personnel incur liability for their institutions both by deliberate and by inadvertent actions.

Selection and Training

The law prohibiting discrimination on the basis of sex is much more developed in the area of employment than in the area of student affairs. Courts have developed standards for applying the law and have handed down many more decisions in cases pertinent to colleges and universities. At least some valuable lessons can be drawn from these decisions that are relevant to student affairs as well. One of them is that both administrative and academic personnel incur liability for their institutions both by deliberate and by inadvertent actions. Overtly sexist attitudes, ignorance, and plain mistakes have resulted in court-ordered sanctions.

Bias, ignorance, and mistaken judgment, however, are not problems unique to this area of college and university administration. The standard way of dealing with them is careful selection of personnel and thorough training of the people who make the selection and the people who are

selected. This same approach is useful in the attempt to reduce the risk of legal liability resulting from sex discrimination.

This process tracks ordinary administrative process. The first step is to identify key positions that involve decisions affecting students and employees. These are the points of potential problems. As these positions fall vacant, they should be filled by applicants who demonstrate a commitment to equal employment and equal educational opportunity. Other measures are indicated for continuing personnel.

Once the key positions have been identified, the incumbents should be briefed on the potential for liability from overt and from inadvertent sex discrimination. The briefing should be followed by short workshops that explore the subject further, including the discussion of carefully selected cases. Diplomatic inquiry should be used to identify incumbents known to resist the full integration of women into the life of the institution on an equal footing with men. Dealing effectively with these people is sure to be awkward, but it is essential because their positions of authority can place the institution at serious legal risk.

Two groups of personnel should clearly be included in this process: those in student affairs and those in academics. The key people in student affairs include those in admissions, financial aid, athletics (intramural and interscholastic), student services (especially health services and student organizations), and student housing. The latter group should include department chairs, deans, and other academic officers of the institution.

Special attention should be devoted to the personnel who serve on special search and review committees. Faculty review committees are particularly important because of their central role in employment decisions. The people selected to chair these committees should be known as supportive of the full integration of women into all aspects of campus life. They should be carefully briefed on how to guide their committees so as to avoid providing potential plaintiffs with damaging evidence.

Key personnel require systematic guidance, assistance, information, and monitoring as they perform their duties. One way to ensure this aid is the use of a management

control system, an inexpensive and cost-efficient technique that is easily assimilated into standard college and university administrative practices.

Management Control System

A single model of compliance emerges from the literature reviewed in this report. Its most complete articulation occurs in the Department of Labor regulations known as "Revised Order No. 4" (41 C.F.R. 60-2). When examined closely, the model of compliance commended in the regulations is neither exceptionally novel nor exceptionally complex. Indeed, it tracks the steps any administrator determined to achieve some change in and through an indifferent and perhaps hostile academic organization could be expected to follow. The management control system is comprised of five steps.

1. Design and disseminate a policy statement credibly declaring the intent of the top administration and board to eradicate sex discrimination from all aspects of the life of the institution. The statement should enumerate the principal divisions of the university or college that will be affected—admissions, financial aid, hiring, salaries, athletics, for example—and should specify a target date for full implementation of the policy.

2. Assign responsibility for implementing the policy to one or more specific individual(s), known to his or her peers as a person who can get a job done. (For convenience, call this person the equal opportunity officer or EOO.) The EOO should report directly to the president, should exercise no line responsibility in any area to which the policy applies, and should be trained in the requirements of the law. The EOO should be conversant with the means of compliance and with cost-effective techniques for informing other faculty and administrators and for enlisting their support of the institution's equal opportunity policy. The EOO should be acquainted with programs at other schools (for example, *An Inventory of Equal Opportunity Programs Presently at Various NASULGC Affiliates and Institutions)* and with clearinghouses of relevant information, such as ERIC and the Project on the Status of WOMEN.

3. Assist line administrators in all affected areas to become sensitive to the ways sexual bias can affect their

operations and to understand the full implications of the policy objective for their respective operations. The EOO should organize workshops and other in-house seminars for this purpose.

4. *Develop and implement monitoring devices*. These devices, developed by the EOO, seek to identify the nature and extent of residual sexual bias. Some useful techniques for implementing such devices are statistical studies (Connolly and Peterson 1980; Koch 1982), checklists (Bogart 1981), surveys, grievance procedures, interviews with a sample subpopulation, the review of reports received through standardized grievance procedures (such as those suggested by the EEOC to deal with sexual harassment), and exit interviews. One risk of developing this information, however, is that it may prove useful to potential plaintiffs (Simpson 1982).

5. *Develop action programs to eradicate residual sexual bias on an agreed-upon timetable*. These programs should be practical, circumspect, and cost conscious. They should certainly include a merit salary administration system (Koch 1982) and similar well-defined procedures for hiring, renewal, promotion, tenure, and termination. If statistical studies show that employment practices have disparate impact upon women, equally efficient but less discriminatory alternatives should be developed and implemented. If no such alternatives appear to be available, validation studies of existing practices should be carried out, consistent with EEOC's *Uniform Guidelines on Employee Selection Procedures*. Analogous actions can be devised for admissions, financial aid, and other student-related procedures. Above all, these action programs should be monitored closely to determine whether they are in fact generating the desired results.

Colleges and universities that diligently employ a management control system to eradicate sex discrimination from their institutions minimize their risk of liability under antidiscrimination laws and at the same time generate the base of evidence to be used in negotiation and litigation with future complainants. Conscientious use of such systems for that purpose constitutes the good faith effort that is sufficient to comply with equal opportunity and affirmative action requirements and to avoid liability for intentional discrimination.

Indemnification

Although the risk of liability under antidiscrimination laws can be minimized by the careful selection and training of personnel and by the use of a management control system, it can never be completely eliminated. Some indications have surfaced that show a strategy to complement the management control system: Institutions may secure indemnification against losses suffered as a result of unintentional discrimination. In two cases, courts ordered insurers to pay such claims arising under "umbrella excess liability" policies covering personal injury losses [*Solo Cup Co.* v. *Federal Insurance Co.*, 619 F.2d 1178 (8th Cir. 1980), *cert. denied*, 449 U.S. 1033 (1980); *Union Camp Corp.* v. *Continental Casualty Co.*, 452 F. Supp. 565 (S.D. Ga. 1978)]. A recent news item announced that "sexual harassment insurance" is available from Lloyds of London (*Chronicle* 1982). Although such coverage cannot take care of all costs related to sex discrimination, it could certainly have been a great comfort to the dozens and dozens of colleges and universities that have incurred losses of hundreds of thousands of dollars.

The critical feature of any practical compliance strategy, although sometimes obscured by extended attention to detail, is that the institution deliberately intends to do the right thing by individual students and employees. Such intentions manifest themselves in policies and procedures that treat individuals fairly and nonpreferentially. To ensure that this intention is translated into action, policies and procedures must be carefully designed and evenhandedly and sensitively enforced. And of almost equal importance in any practical compliance strategy is to design and periodically update policies and procedures in light of developments in case law and regulations.

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The ERIC Clearinghouse on Higher Education abstracts and indexes the current literature on higher education for the National Institute of Education's monthly bibliographic journal *Resources in Education*. Most of these publications are available through the ERIC Document Reproduction Service (EDRS). For publications cited in this bibliography that are available from EDRS, ordering number and price are included. Readers who wish to order a publication should write to the ERIC Document Reproduction Service, P.O. Box 190, Arlington, Virginia 22210. When ordering, please specify the document number. Documents are available as noted in microfiche (MF) and paper copy (PC). Because prices are subject to change, it is advisable to check the latest issue of *Resources in Education* for current cost based on the number of pages in the publication.

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